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A recent case in the New York Court of Appeals—Wolf v. The American Tract Society—is an illustration of the occasional hardship of the law. There, a plaintiff who had sustained injuries through the negligence of one of certain contractors, was remediless through inability to identify the wrongdoer. It was held that, although under the maxim *res ipsa loquitur*, injuries, caused by the falling of a brick from a building in process of construction on a public street by nineteen independent contractors, employing about 250 men, may be presumed to have been the result of negligence, as there was no proof whatever as to who set the brick in motion or from what part of the building it came, the presumption of negligence was not sufficient to sustain a recovery of damages against two of the contractors, one being in charge of the carpenter work and the other of the mason work, since the party responsible for the injury was not identified. "Cases must occasionally happen," says the court, "where the person really responsible for a personal injury cannot be identified or pointed out by proof, as in this case, and then it is far better and more consistent with reason and law that the injury should go without redress than that innocent persons should be held responsible upon some strained construction of the law developed for the occasion. The idea suggested in this case, that all or any of the nineteen contractors may be held since the plaintiff is unable by proof to identify the real author of the wrong, is born of necessity, but embodies a principle so far-reaching and dangerous that it cannot receive the sanction of the courts."

The New York Law Journal calls attention to the still more recent case of Bishop v. Leahy, decided by the New York Supreme Court. It appeared there that plaintiff was struck by a window frame and some bricks falling from the upper story of a building. One of the defendants had the masonry contract for the building; and the other, the contract for the carpenter work. The carpenters set the frame which fell, and fastened it with one brace from the side to the floor, completing the work before noon, and were thereafter in the neighborhood. The accident occurred early in the afternoon, and none but masons were on that floor at the time. There was a high wind, and there was some evidence that one brace was insufficient. It was held that a verdict against both defendants was justified by the evidence.

"The latter case," says the publication mentioned, "was decided after the decision in Wolf v. American Tract Society, and presumably the judges of the appellate division had had their attention called to the decision or the court of appeals, although it is not referred to in the opinion. Although the two cases are somewhat similar on the facts, there is a broad distinction between them. Taken together they illustrate the principle that the question whether or not a *prima facie* case of negligence has been made out against a defendant ultimately rests in sound judicial discretion. As to possibility of negligence on the part of one or two of nineteen contractors, a court may well say that the proof fails for lack not only of certainty, but even of approximate identity of the party chargeable with the wrongful act. Where, however, the question of actual negligence is confined to only two possible tort-feasors, and the circumstances tend to show that either or both of them may have been delinquent and nothing of explanation or exoneration is offered by either of them, it seems legitimate in principle and substantially just to sanction a verdict against both of them."

NOTES OF IMPORTANT DECISIONS.

STATUTE OF FRAUDS—REAL PROPERTY—PARTNERSHIP.—In Schultz v. Waldons, 47 Atl. Rep. 187, decided by the Court of Chancery of New Jersey, it was held that where there had been no previous partnership or joint enterprise between the parties, and they agreed by parol that defendant should purchase and take title to land in his own name, and hold it for the joint benefit of both, and plaintiff contributed no money to the enterprise, the contract was within the statute of frauds, requiring agreements relating to land to be in writing, and plaintiff could not recover any interest in the land without written proof of the contract. The court said in part:

"Against the general proposition above referred to, namely, that the mere fact of a joint or partnership enterprise will prevent the operation of the statute, may be cited the old case of Bart-

lett v. Pickersgill (1760), 1 Eden, 515, 1 Cox, Ch. 15. The leading case in this country is Smith v. Burnham, 3 Sumn. 435, where Justice Story makes an elaborate examination of all the authorities up to that date (1838). There the learned justice, in a case much like the present, held—First, that the plaintiff's case was not made out, and, second, if it was made out, it was within the statute of frauds. The case in this State of Personette v. Pryme, 34 N. J. Eq. 26, simply holds that two owners of land, a farm, could agree by parol that the working of the property on a farm should be considered and conducted as partnership business, each owner contributing equally to the support of a widow, whose support for life was a charge on the land, and to the expenses and taxes, and that an account should be kept of the proceeds derived from the sale of the produce, and of the sale of any sand therefrom. The case of Chester v. Dickerson (1873), 54 N. Y. 1, was a suit against three persons who were alleged by the plaintiff to be engaged in partnership in the buying and selling of lands, charging them with fraud in representations made with regard to those lands to induce a sale thereof to the plaintiff. The title was in one of the defendants, and the representation was made by one of the defendants, who was not the owner of the land, and the alleged partnership between them was proven entirely by parol. The question here involved was not therein involved, though the learned justice, in delivering the opinion of the Court of Appeals, held that a partnership in dealings in land could exist by parol. In the course of the opinion the court approves of the reasoning of Vice Chancellor Wigram in Dale v. Hamilton, 5 Hare, 369, but does not call attention to the fact that there was a written declaration signed by the defendants in that case, or to the fact that on appeal the plaintiff's case was rested wholly on that written contract. These circumstances prevent the case from having any application to the present case. Another case in New York is Traphagen v. Burt (1876), 67 N. Y. 30. There three parties were confessedly engaged in the business of buying and improving real estate. They bought two farms, and the title was conveyed to the parties jointly. Moneys were expended by all the parties in the improvement of these farms, and there was an established partnership fund and going business. Then one of the parties, by consent of the others, purchased a third farm, and, without the knowledge or consent of his partners, had the title taken in his own name. Afterwards it was treated as partnership property, precisely as the other two farms. The headnote states the decision thus: 'After discovery by the plaintiff of the fact that the farm was conveyed to defendant, the parties entered into an agreement that plaintiff should convey to defendant his interest in one of the other farms and in the personal property thereon; defendant agreeing, among other things, to convey to plaintiff an undivided one-half interest in the farm in question. The agreement was fully executed, save in respect to such conveyance, which defendant refused to execute. Held that, aside from the question of the co-partnership, plaintiff was entitled to and could enforce a specific performance in this particular.' An authority in New York in favor of the position I have above taken is Levy v. Brush, 45 N. Y. 589. The headnote of that case is as follows: 'A verbal agreement was entered into between the plaintiff and defendant, by which the latter agreed to bid off in his own name and enter into a contract for the purchase of the land, and pay from his own funds the necessary amount for that purpose for the joint benefit of both. The plaintiff was to reimburse one-half of the money so paid, the deed to be taken in the name of both. Held, the defendant having bid off the land in his name, and taken a contract thereof, but refused to convey one-half of the contract to the plaintiff, that no action would lie to compel the execution of the agreement.' In Bissell v. Harrington (1879), 18 Hun, 81, an agreement was made between the members of a partnership already existing to buy a farm on speculation on account of the partnership, each party furnishing his share of the funds necessary to carry out the speculation. That distinguishes the case from the present. In Everhart's Appeal (1884), 106 Pa. St. 349, the headnotes are: '(1) Where a partnership is formed for the purpose of buying and selling lands, one of the partners cannot establish his interest in such lands by parol evidence, where the other sets up the statute of frauds, requiring agreements relating to lands to be in writing. (2) But that rule does not apply to an agreement for a division of profits arising from the sale of lands so purchased by the partnership.' The case is quite similar to the one before the court, and the proofs consisted entirely of proof of admissions by the defendant of the complainant's one-half interest in the enterprise; and there were also distinct admissions relating to a large sum of money and other personal chattels in the hands of the defendant, representing the profits of the transaction. The court held that as to those profits the admission was binding, but not as to any of the real estate not yet disposed of. The above remarks cover the most important of the authorities cited by Mr. Browne in his treatise on the Statute of Frauds (sec. 261 *et seq.*), and by Mr. Reed in his treatise (vol. 2, sec. 727 *et seq.*)."

FORECLOSURE IN THE FEDERAL COURTS.

General View of Jurisdiction.—Certain of the United States courts are endowed with jurisdiction, concurrent with the State courts, in the foreclosure of mortgages where special grounds exist, such as will be hereafter dis-

cussed. This jurisdiction cannot be abridged by State legislation.[1] It is usually vested in the circuit court,[2] but in some foreclosure cases the district court may have jurisdiction, as where the defendant is a foreign consul.[3] As the West Point military reservation has never been detached from the southern district of New York, the circuit court of that district has jurisdiction of a bill to foreclose a mortgage executed by a railway of its right of way through such reservation.[4] Where the other grounds of jurisdiction exist the federal circuit court may entertain a bill to foreclose a mortgage on land situated within the district, though neither party resides therein,[5] or even in the State,[6] and though there is but one defendant.[7] The principal grounds of federal jurisdiction in foreclosure suits are diversity of citizenship and a certain amount in controversy, and these will now be discussed.

Diversity of Citizenship.—The circuit courts of the United States have, as a rule, no jurisdiction in foreclosure cases unless the controversies are "between citizens of different States,"[8] *i. e.*, "it must appear that the parties to the cause on one side are all citizens of different States from those on the other."[9] Hence a suit to foreclose cannot be maintained in those courts by bondholders, one of whom is a citizen of the same State with one or more of the defendants,[10] although the resident complainant came into the suit by intervention, but for which the citizenship would have been diverse.[11] But a separate suit by each non-resident bondholder is maintainable,[12] and it has been held that merely joining as defendant a trustee who had refused to act in a suit by one of the bondholders who was a citizen of the same State with such defendant, would not deprive the court of jurisdiction, since the trustee would be only a nominal party.[13] *A fortiori*, the suit may proceed though the trustee so joined is a citizen of the same State with the other defendants.[14] "The fact that the beneficiary in a trust deed may be a citizen of the same State as the grantor would not, if the trustee is a citizen of a different State, defeat the jurisdiction of the federal court."[15] But where the bondholder himself brings the suit he must show a reason for the failure of the trustee to do so, where the latter is a citizen of the same State with the mortgagor.[16] Jurisdiction is not lost by joining as defendant in a foreclosure suit the purchaser at the sale of the same property under a previous foreclosure, notwithstanding he and the complainant are citizens of the same State.[17] But where under the State statute a former owner of the equity of redemption is a necessary defendant, and is a citizen of the same State with complainant, the federal court cannot retain the suit, though under the general rule such defendant need not be joined.[18] Where

[1] Ray v. Tatum, 72 Fed. Rep. 112; Gamewell Fire Alarm Tel. Co. v. Mayor, 31 Fed. Rep. 312; Benjamin v. Cavaroc, 2 Woods (U. S.), 168, 172; Mercantile Trust Co. v. Missouri, etc. R. Co., 48 Fed. Rep. 351; Davis v. James, 2 Fed. Rep. 618; United States v. Howland, 4 Wheat. (U. S.) 108.

[2] Conn. Mut. Life Ins. Co. v. Crawford, 21 Fed. Rep. 281; Beekman v. Hudson River West Shore R. Co., 35 Fed. Rep. 3.

[3] Pooley v. Luco, 76 Fed. Rep. 146.

[4] Beekman v. Hudson River West Shore R. Co., 35 Fed. Rep. 3.

[5] Kuhn v. Morrison, 75 Fed. Rep. 81.

[6] Wheelwright v. St. Louis, etc. Co., 50 Fed. Rep. 709.

[7] Wheelwright v. St. Louis, etc. Co., 50 Fed. Rep. 709.

[8] 25 U. S. Stats. at Large, 433, as corrected by the act of congress of August 13, 1888.

[9] Removal Cases, 100 U. S. 468.

[10] Mangels v. Donan Brewing Co., 53 Fed. Rep. 513; Jackson & Sharp Co. v. Burlington, etc. R. Co., 29 Fed. Rep. 474.

[11] Mangels v. Donan Brewing Co., 53 Fed. Rep. 513, distinguishing Stewart v. Dunham, 115 U. S. 61.

[12] Jackson & Sharp Co. v. Burlington, etc. R. Co., 29 Fed. Rep. 474, citing Chicago, etc. R. Co. v. Fosclick, 106 U. S. 47.

[13] Barry v. Missouri, etc. R. Co., 27 Fed. Rep. 1; Hack v. Chicago, etc. R. Co., 23 Fed. Rep. 356; County v. Kansas P. R. Co., 4 Dill. (U. S.) 277; Pac. R. Co. v. *Cf.* Arapahoe, Ketchum, 101 U. S. 289.

[14] Hotel Co. v. Wade, 97 U. S. 13; Reinach v. Atlantic, etc. R. Co., 58 Fed. Rep. 33.

[15] Brewer, J., in Dodge v. Tulleys, 144 U. S. 451, 456. In this case the suit was brought by the trustee, and the bill failed to allege the citizenship of the beneficiary.

[16] Needham v. Wilson, 47 Fed. Rep. 97.

[17] Farmers' Loan & Trust Co. v. Houston, etc. R. Co., 47 Fed. Rep. 115.

[18] Winchell v. Carli, 24 Fed. Rep. 865, where the court, after quoting the statute of Connecticut imposing such requirement, says: "The complainant, in order to preserve his legal rights against the maker of the note, was compelled to make him a party to the complaint for foreclosure. Complete relief could not be obtained unless this had been done; for, although an execution could not be issued against Carli in this proceeding, no judgment could ever be rendered against him unless he had been a party to this suit. There is, as in the case of Ayres v. Wiswall, 112 U. S.

a defendant foreign insurance company which had issued a policy to the mortgagor filed a cross bill to foreclose another mortgage, which was resisted by both complainant and mortgagor, who were citizens of the same State, the court was nevertheless held to have jurisdiction.[19] By virtue of the act of congress which authorizes the court to proceed as to the parties before it in the absence of one or more defendants,[20] the circuit court has jurisdiction where citizenship is diverse, of a suit to foreclose a mortgage on land in the district, though the complainant and part of the defendants are non-residents of such district,[21] and the same has been held where there was but one defendant and both parties were non-residents of the State.[22] But this act confers no jurisdiction of a bill to foreclose a mortgage by an executor by virtue of a power in the will, the land having been devised to testator's children, some of whom are non-residents and in no way before the court.[23] Diversity of citizenship is not necessary to confer jurisdiction upon a federal circuit court in proceedings to foreclose a mortgage of property in the possession of a receiver appointed by such court,[24] and this rule obtains whether such proceeding be by original bill, cross bill, or intervention.[25]

The Same Continued — Where Bond or Mortgage Has Been Assigned.—The foregoing section has reference to foreclosure cases where only the original parties to the transaction or their privies are concerned. Different rules apply where the suit is brought by an assignee of the note and mortgage. The present federal statute provides that the circuit court "shall not have cognizance of any suit, * * * to recover the contents of any promissory note or other chose in action in favor of any assignee, * * * unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."[26] A bill to foreclose is a suit "to recover the contents of * * * a chose in action within the meaning of this statute,[27] and cannot therefore be maintained in the federal court by an assignee unless the assignor might likewise have done so.[28] Where the note or bond is issued with

187, 5 Sup. Ct. Rep. 90, 'but one cause of action,'—the mortgage, and the debt which it secured,—and it was indispensable if the complainant wished to preserve the legal liability of Carll upon the note, and to keep unimpaired his own right to complete relief upon his cause of action, to make Carll a defendant. The question which is here involved comes within the principle decided in Ayres v. Wiswall." See also Coney v. Winchell, 116 U. S. 227.

[19] Wolcott v. Sprague, 55 Fed. Rep. 545.

[20] U. S. Rev. Stat. 873, providing that, "When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, nor voluntarily appearing to answer, and non-joinder of parties who are not inhabitants nor found within the district as aforesaid shall not constitute matter of abatement or objection to the suit."

[21] Ames v. Holderbaum, 42 Fed. Rep. 341.

[22] Wheelwright v. St. Louis, etc. Co., 50 Fed. Rep. 709.

[23] Detweiler v. Holderbaum, 42 Fed. Rep. 337.

[24] Toledo, etc. R. Co. v. Continental Trust Co., 95 Fed. Rep. 497; Fish v. Ogdensburg, etc. R. Co., 79 Fed. Rep. 131; Park v. N. Y., etc. R. Co., 70 Fed. Rep. 641; Compton v. Jesup, 68 Fed. Rep. 263; Lumley v. Wabash R. Co., 76 Fed. Rep. 66; Farmers' Loan & Trust Co. v. Houston, etc. R. Co., 44 Fed. Rep. 115.

[25] Toledo, etc. R. Co. v. Continental Trust Co., 95 Fed. Rep. 497; Morgan's etc. Co. v. Texas Central Ry. Co., 137 U. S. 171; Gumbel v. Pitkin, 124 U. S. 131; Byers v. Macauley, 149 U. S. 608; Rouse v. Letcher, 156 U. S. 48; Blake v. Pine Mt., etc. Coal Co., 84 Fed. Rep. 1014.

[26] 25 U. S. Stat. at Large 434. This is the act of March e, 1887, which superseded the act of 1875 (18 Stat. at Large, 470) which in turn superseded the original act of 1789. U. S. Rev. Stats. sec. 629.

[27] In Sheldon v. Sill, 8 How. (U. S.) 441, Mr. Justice Grier says: "In equity, the debt or bond is treated as the principal, and the mortgage as the incident. It passes by the assignment or transfer of the bond, and is discharged by its payment. It is, in fact, but a special security, or a lien on the property mortgaged. The remedy obtained on it in a court of equity is not the recovery of land, but the satisfaction of the debt. It is the pursuit by action of one debt on two instruments or securities, the one general the other special. The decree is, that the mortgaged premises be sold to pay the debt, and if insufficient for that purpose that the complainant have further remedy by execution for the balance The complainant in this case is the purchaser and assignee of a sum of money, a debt, a chose in action, not of a tract of land. He seeks to recover by this action a debt assigned to him. He is therefore the 'assignee of a chose in action,' within the letter and spirit of the act of congress under consideration, and cannot support this action in the circuit court of the United States where his assignor could not." See also Hill v. Winne, Fed. Cases No. 6,503. The contrary decision in Dunclas v. Fowler, Fed. Cases No. 4,140, cannot be given much weight in view of the foregoing. Specific performance is also a suit within the terms of the statute. Shoeraft v. Bloxham, 124 U. S. 730; Boston Safety, etc. Co. v. Plattsmouth, 76 Fed. Rep. 881.

[28] Mersman v. Werges, 1 McCrary (U. S.), 528, reversed on another point in 112 U. S. 139.

the name of the payee blank it is, in legal effect, payable to bearer,[29] and while it was held by the supreme court under a former act that the federal courts had jurisdiction of a suit thereon by a subsequent holder, though the first one was a citizen of the same State with complainant,[30] there is authority for the contrary rule under the present statute.[31] So it is probably not necessary that the assignment be in writing.[32] In an action at law on an accommodation note, whose maker and payee were citizens of the same State, but which was immediately indorsed, in accordance with a previous agreement, to a citizen of another State, it was held that the nominal payee was the real maker, and that, as there had been no actual assignment, the federal court had jurisdiction.[33] The statute is inapplicable to actions for possession,[34] and where a party avails himself in the United States court of a method of foreclosure, which is in effect such an action, the court may have jurisdiction, though the claim has been assigned and the assignor could not have sued in that court.[35]

Under the former act of 1875 the restriction concerning suits by assignees was removed as to "promissory notes negotiable by the law merchant," and it was held that mortgages given to secure such notes might be foreclosed in the federal courts at the suit of assignees without reference to the citizenship of the assignors.[36] Nor did the fact that the paper was overdue remove it from the benefits of this exception,[37] though it did not apply to the foreclosure of a mortgage given to secure a negotiable bond.[38] In order that an assignment should be collusive it was necessary, under the act of 1875, that it should appear to be the object of the transfer to create a case cognizable under the act,[39] and, under the act of 1789, that the assignee should know of the purpose.[40] The bill seeking foreclosure of an assigned mortgage in the federal court should contain an averment that suit might have been maintained there by the assignor had no assignment been made,[41] for the jurisdictional facts as to citizenship must always appear.[42]

The Same Continued—Amount in Controversy.—In order for the federal circuit court to acquire jurisdiction of a bill to foreclose, the case must be one "where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars."[43] The phrase "matter in dispute" has been defined by the supreme court as "the subject of litigation—the matter upon which the action is brought and the issue is joined, and in relation to which, if the issue be one of fact, testimony is taken."[44] In foreclosure cases this is usually the bond and mortgage. Hence where the amount of these is exactly two thousand dollars, the circuit court acquires no jurisdiction by including in the suit two interest coupons but for the non-payment of which the cause of action would not have accrued,[45] nor by claiming judgment for the amount of the re-

[29] Steel v. Rathbun, 42 Fed. Rep. 390; White v. Vermont, etc. R. Co., 21 How. (U. S.) 575.

[30] White v. Vermont, etc. R. Co., 21 How. (U. S.) 575.

[31] Steel v. Rathbun, 42 Fed. Rep. 390.

[32] See Mersman v. Werges, 1 McCrary (U. S.), 528. This case was reversed on appeal (112 U. S. 139), but there was no intimation that had the note in fact been void the mortgage could not have been assigned by delivery.

[33] Holmes v. Goldsmith, 147 U. S. 150, 36 Fed. Rep. 484. No such ruling seems yet to have been made in a foreclosure case.

[34] Sheldon v. Sill, 8 How. (U. S.) 441; Smith v. Kernochen, 7 How. (U. S.) 198; Whiting v. Wellington, 10 Fed. Rep. 810.

[35] Whiting v. Wellington, 10 Fed. Rep. 810.

[36] Cross v. Allen, 141 U. S. 528; Mersman v. Werges, 112 U. S. 139, reversing 1 McCrary (U. S.), 528; Tredway v. Sanger, 107 U. S. 323; Allen v. O'Donald, 28 Fed. Rep. 17; Seckel v. Backhaus, Fed. Cas. No. 12,599.

[37] Cross v. Allen, 141 U. S. 528; Allen v. O'Donald, 28 Fed. Rep. 17; Ackley School District v. Hall, 113 U. S. 135; New Providence v. Halsey, 117 U. S. 336.

[38] Blacklock v. Small, 127 U. S. 96.

[39] Lanier v. Wash, 121 U. S. 404.

[40] Smith v. Kernochen, 7 How. (U. S.) 198.

[41] Corbin v. County of Black Hawk, 105 U. S. 659-667.

[42] Parker v. Ormsby, 141 U. S. 81.

[43] Suppl. to U. S. Rev. Stats., p. 611.

[44] Field, J., in Smith v. Adams, 130 U. S. 167, 175.

[45] Home & Foreign Inv. etc. Co. v. Rag, 69 Fed. Rep. 657, the court saying: "The simple and sole contention for complainant is that the clipping of the coupons from the bond makes them separate obligations, and authorizes the court to consider them in making up the jurisdictional amount. The bond itself is not due. It becomes due by its terms on the non payment of one interest coupon. For the purpose, therefore, of making the debt due, these coupons must be considered as interest past due and unpaid on the bond. The coupons cannot be considered as interest for the purpose of maturing the debt, and as separate, distinct obligations for the purpose of giving this court jurisdiction. It is not believed that the fact suggested in argument, that if these coupons amounted to over $2,000, suit could be brought on them alone, affects the question in any way. Suit on them here is in connection with the

cording fee which complainant alleges that he advanced and that defendant is liable for.[46] But on the other hand it has been held that fire insurance premiums, paid by the mortgagee to prevent the forfeiture of a policy on the mortgaged premises, may be combined with the debt in order to make the jurisdictional amount.[47] Where the amount of the mortgage sought to be foreclosed by the original bill was insufficient to give jurisdiction, but an insurance company which had issued a policy to the mortgagor and had purchased another mortgage executed by him filed a cross bill to foreclose the latter, both mortgages were allowed to be combined in order to make up the jurisdictional sum, though suit had been brought on the policy and the mortgagors claimed that the amount due thereon satisfied the mortgage.[48] A mortgage owned by the United States might be foreclosed in the federal circuit regardless of its amount.[49]

Concurrent Jurisdiction of State and Federal Courts.—The general rule obtains in foreclosure, as in other cases where jurisdiction is concurrent, that the court first assuming jurisdiction retains it during the entire pendency of the suit.[50] The court should also entertain and determine such other pertinent questions as are necessary to give the mortgagee full relief.[51] Hence where the bill joins as defendants judgment creditors of the mortgagor's grantor, the federal court will not defer action until the termination of proceedings by such creditors in the State court to establish liens on the land.[52] Of course a decree once rendered in the State court is a bar to further prosecution of the suit in the federal court.[53] But a mortgagee is not precluded from seeking to foreclose in the federal court because a suit upon the same cause of action is already pending in the State court.[54] And, *a fortiori*, is this true where the relief sought and the parties are different.[55] The fact that the mortgagor has made a general assignment for creditors under the jurisdiction of a State court will not preclude the mortgagee from bringing a bill to foreclose in the federal court,[56] nor will the possession of a receiver appointed by the State court interfere with a suit already pending in the federal court to foreclose a mortgage of the same property.[57] On the other hand, the pendency of a suit in the federal circuit court, brought by a mortgage trustee against an insolvent corporation and its bondholders, in which the issue of receivers' certificates has been authorized and a decree of foreclosure and sale rendered

bond on which they are interest, and as, under the terms of the acts of 1887 and 1888, the amount involved must be $2,000, exclusive of interest and costs, it is not believed that the suit in this case is for the necessary jurisdictional amount."

[46] Less v. English, 85 Fed. Rep. 471, where it is observed: "Under the allegations of this bill the law gave to the plaintiff no right to recover this $2.25 recording fee. There was no agreement either express or implied, so far as the bill shows, that the defendant would pay it, and we think the circuit court should, of its own motion, have dismissed the bill for want of jurisdiction. Hartog v. Memory, 116 U. S. 588, 6 Sup. Ct. Rep. 521; Williams v. Nottawa, 104 U. S. 209; Robbins v. Ellenbogen, 36 U. S. App. 242, 18 C. C. A. 83, and 71 Fed. Rep. 4; Barth v. Coler, 19 U. S. App. 646, 9 C. C. A. 81, and 60 Fed. Rep. 466; Thurber v. Miller, 32 U. S. App. 209, 14 C. C. A. 432, and 67 Fed. Rep. 371." There is, however, a strong dissenting opinion by Judge Sanborn.

[47] Coolidge v. Ray, 75 Fed. Rep. 39.

[48] Wolcott v. Sprague, 55 Fed. Rep. 545.

[49] United States v. Sayward, 160 U. S. 493.

[50] *Federal Cases*—Bill v. New Albany, etc. R. R. Co., 2 Biss. (U. S.) 390; Central Nat. Bank v. Hazard, 49 Fed. Rep. 293; Union Trust Co. v. Rockford, etc. R. Co., 6 Biss. (U. S.) 197. *Cf.* Atkins v. Wabash, etc. R. Co., 29 Fed. Rep. 161. *Alabama*—Gay v. Brierfield Coal & Iron Co., 94 Ala. 303, 308. *California*—Levy v. Haake, 53 Cal. 267. *Wisconsin*—Milwaukee, etc. R. R. Co. v. Milwaukee, etc. R. R. Co., 20 Wis. 174.

[51] Kuhn v. Morrison, 75 Fed. Rep. 81.

[52] Converse v. Michigan Diary Co., 45 Fed. Rep. 18.

[53] Stout v. Lye, 103 U. S. 66.

[54] Gordon v. Gilfoil, 99 U. S. 168, the court saying: "It has been frequently held that the pendency of a suit in a State court is no ground even for a plea in abatement to a suit upon the same matter in a federal court. What effect the bringing of this suit, *via ordinaria*, may have had on the order of seizure and sale, it is not necessary to determine. It is possible that it superseded it. But the pendency of that proceeding, when the suit was commenced, cannot affect the validity of the proceedings in this suit, nor the jurisdiction of the court in respect thereof." See, also, Veaver v. Field, 16 Fed. Rep. 22; Stanton v. Embrey, 93 U. S. 548; Woodbury v. Allegheny, etc. R. Co., 72 Fed. Rep. 371; Beekman v. Hudson River, etc. R. Co., 35 Fed. Rep. 3.

[55] Brooks v. Vermont Cent. R. R. Co., 14 Blatchf. (U. S.) 463.

[56] Edwards v. Hill, 59 Fed. Rep. 723, where the authorities are reviewed in an able opinion by Judge Caldwell. In Smith, etc. Co. v. McGroarty, 136 U. S. 237, it was held that a mortgage might be set aside in the federal court after an assignment under the State law. See, also, Morris v. Lindauer, 54 Fed. Rep. 23.

[57] Bridgeport Electric & Ice Co. v. Meader, 72 Fed. Rep. 115. *Cf.* Mercantile Trust Co. v. Missouri, etc. R. Co., 48 Fed. Rep. 351.

without effort to collect the outstanding indebtedness of the stockholders, will not exclude the jurisdiction of a State court to entertain a bill by general creditors not parties to the suit who attack the mortgage bonds on the ground of fraud, illegality and want of consideration.[58] But the federal court may retain jurisdiction of a bill to foreclose though a State court has appointed a receiver of the property.[59] A State court is without power to interfere by injunction with foreclosure proceedings[60] in a federal court having jurisdiction thereof, or with a decree rendered therein.[61]

Removal of Suits.—A foreclosure suit originally commenced in the State court may be removed to the federal court at the instance of a defendant, if the grounds exist which would have conferred jurisdiction on the latter court had the suit been begun there,[62] and a suit so removed may be consolidated with one already pending in the federal court in which the State court plaintiff has filed a cross bill to foreclose the same mortgage.[63] But no such suit may be removed if there is necessary defendant who is a citizen of the same State with the plaintiff.[64] So a suit to enjoin a sale under a mortgage does not become removable because the trustee, who is made a defendant, and who is a citizen of the same State with plaintiff, resigns his trust.[65] Nor can a bill to cancel several mortgages be removed if citizenship is not diverse, though separate suits might have been brought which would have been removable.[66]

The Same Continued — Separable Controversy. —But in order to remove a foreclosure suit from a State to the federal court, it is not always necessary that all the parties on one side are citizens of a different State from those on the other.[67] If it involve "a controversy which is wholly between citizens of different States," the entire suit may be removed at the instance of a defendant who is a party to such controversy, though there are plaintiffs and defendants who are citizens of the same State.[68] In construing this provision, however, the courts have not found many foreclosure cases which presented what they considered to be a separable controversy. Thus the fact that other incumbrancers are joined with the mortgagor as defendants, and that these present separate defenses, will not make the controversy independent as to each one, if the relief sought is merely the foreclosure of the mortgage with the incidental result of cutting off other liens.[69] In other words, if the cause of action is single, it matters not how many defenses may be offered.[70] So a separable controversy is not

[58] Say v. Brierfield Coal & Iron Co., 94 Ala. 303.

[59] Mercantile Trust Co. v. Missouri, etc. R. Co., 48 Fed. Rep. 351.

[60] Central Nat. Bank v. Hazard, 49 Fed. Rep. 293.

[61] Gernsheim v. Olcott, 7 N. Y. Suppl. 872.

[62] Suppl. to U. S. Rev. Stats., p. 12, sec. 2, 24 Stats. at Large 552, ch. 373.

[63] Wabash, etc. R. Co. v. Central Trust Co., 23 Fed. Rep. 513.

[64] Coney v. Winchell, 116 U. S. 227; Darst v. Bates, 51 Ill. 439.

[65] Ruohs v. Jarvis-Conklin Mortgage Trust Co., 84 Fed. Rep. 513.

[66] Springer v. Sheets, 115 N. Car., 20 S. E. Rep. 469.

[67] Wabash, etc. R. Co. v. Central Trust Co., 23 Fed. Rep. 513.

[68] Suppl. to U. S. Rev. Stats., p. 612, sec. 2, containing the act of congress of 1887, as corrected 1888. The full text of sec. 2 is as follows: "That said courts, when sitting in equity for the trial of patent cases, may impanel a jury of not less than five and not more than twelve persons, subject to such general rules in the premises as may, from time to time, be made by the supreme court, and subject them to such questions of fact arising in such cause as such circuit court shall deem expedient; and the verdict of such jury shall be treated and proceeded upon in the same manner and with the same effect as in the case of issues sent from chancery to a court of law and returned with such findings." The acts of 1866 and 1875, 18 U. S. Stats. at Large, 470, ch. 137, contained provisions intended to promote the same end.

[69] Ayres v. Wiswall, 112 U. S. 187, the court saying: "There is here but one cause of action. The personal decree which is asked against Wiswall is incident to the main purpose of the suit. It presents no separate cause of action. The fact that separate answers were filed, which raised separate issues in defending against the one cause of action, does not create separate controversies within the meaning of that term as used in the statute. They simply present different questions to be settled in determining the rights of the parties in respect to the one cause of action for which the suit was brought. Hyde v. Ruble, 104 U. S. 407; Winchester v. Loud, 108 U. S. 130; Shainwald v. Lewis, 108 U. S. 158." See, also, Robbins v. Ellenbogen, 71 Fed. Rep. 4; Thurber v. Miller, 67 Fed. Rep. 371; Hax v. Casper, 31 Fed. Rep. 499; Merchants' National Bank v. Thompson, 4 Fed. Rep. 876. *Cf.* Maher v. Tower Hotel Co., 94 Fed. Rep. 225; Sweeney v. Grand Island, etc. R. Co., 61 Fed. Rep. 3; Flynn v. Des Moines, etc. R. Co., 63 Iowa, 490; Northwestern, etc. Bank v. Suksdorf, 15 Wash. 475.

[70] Robbins v. Ellenbogen, 71 Fed. Rep. 4, 18 C. C. A. 83, with exhaustive note by Wm. L. Clark; Thurber v. Miller, 67 Fed. Rep. 371; Hax v. Caspar, 31

occasioned by filing an answer which attacks the validity of the mortgage,[71] or sets up claims adverse to the plaintiff.[72] Nor is a controversy separable as between a trustee in a trust deed, the owner of the equity of redemption, and subsequent incumbrancers,[73] nor as between the plaintiff and a guarantor of the notes, to secure which the deed of trust is given.[74] Wherever among the defendants there is one whose citizenship is the same as that of a plaintiff, the suit cannot be removed on this ground,[75] even though the foreign defendant may default or disclaim,[76] and (it is even held) though by bringing separate suits or omitting certain defendants, as might have been done, the cause would have been removable.[77] But, on the other hand, it is said that a controversy is separable if it might have been made the subject of a distinct action between them,[78] and, therefore, such a controversy may arise concerning the priority of liens,[79] or between a plaintiff bondholder and the defendant railway company, its officers or trustees, regardless of other defendants,[80] or between the mortgagee and a judgment creditor who attacks the mortgage as fraudulent.[81]

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Fed. Rep. 499; Northwestern, etc. Bank v. Suksdorf, 15 Wash. 475; Shower v. Hardin, 30 Fed. Rep. 801.

[71] Maish v. Bird, 48 Fed. Rep. 607; Donohoe v. Mariposa Land Co., 5 Sawy. (U. S.) 163. But see Rich v. Gross, 29 Neb. 337.

[72] Thompson v. Dixon, 28 Fed. Rep. 5.

[73] Maher v. Tower Hotel Co., 94 Fed. Rep. 225.

[74] Darst v. Bates, 61 Ill. 440.

[75] Coney v. Winchell, 116 U. S. 227; Darst v. Bates, 51 Ill. 440.

[76] Hax v. Casper, 31 Fed. Rep. 499. *Cf.* Ruobis v. Jarvis-Conklin Mortgage Trust Co., 84 Fed. Rep. 513.

[77] Springer v. Sheets, 115 N. Car. 370, 20 S. E. Rep. 469.

[78] Capital City Bank v. Hodgin, 22 Fed. Rep. 209, the court saying: "As the controversy, therefore, between the mortgagees might have been made the subject of a distinct action between them, to which the mortgagor need not have been made a party, it follows that in the present suit there is involved a controversy between the mortgagees which can be fully determined as between them, without the presence of the mortgagor, and therefore the case is brought within the terms of the section in question, and the cause was properly removed to this court." See, also, Rich v. Gross, 29 Neb. 337.

[79] Foster v. Chesapeake, etc. R. Co., 47 Fed. Rep. 369; Capital City Bank v. Hodgin, 22 Fed. Rep. 209; Burnham v. Chicago, etc. R. Co., 4 Dill. (U. S.) 503.

[80] Osgood v. Chicago, etc. R. Co., 6 Biss. (U. S.) 330.

[81] Rich v. Gross, 29 Neb. 337.

CONTRACTS — VALIDITY — AGREEMENT NOT TO CONDUCT BUSINESS — STIFLING COMPETITION — PROMOTING MONOPOLY.

TUSCALOOSA ICE MFG. CO. v. WILLIAMS.

Supreme Court of Alabama, June 14, 1900.

Where plaintiff and defendant, each of whom owned an ice plant in a city of 7,000 inhabitants, in which there were no other ice factories, entered into a contract whereby plaintiff, in consideration that defendant should pay him a certain sum annually, agreed not to run his ice plant nor suffer it to be run for five years, unless he should sell it, in which event he released the defendant from all subsequent payments, the contract was void as contrary to public policy, since it stifled competition and promoted a monopoly.

MCCLELLAN, C. J.: B. H. Williams is plaintiff, and the Tuscaloosa Ice Manufacturing Company is defendant, in this action. The complaint is as follows: "The plaintiff claims of the defendant the sum of three hundred and twenty-five dollars, with interest from the 1st day of September, 1898, as damages for the breach of a contract or agreement entered into between the plaintiff and defendant on, to-wit, the 1st day of January, 1898, in substance as follows: This agreement, made and entered into between the Tuscaloosa Ice Mfg. Co., of which Henry B. Gray is president, of the first part, B. H. Williams, sole owner of an ice machine located near the Alabama Great Southern Railroad depot, at Tuscaloosa, Ala., of the second part, witnesseth, that the party of the first part, for and in consideration of the covenants of the party of the second part hereinafter mentioned, agrees to pay the party of the second part the sum of eight hundred and seventy-five dollars ($875.00), in five equal payments, of one hundred and seventy-five dollars each ($175.00), the first payment to be made this day, and the other four payments on the 1st day of June, 1898, 1899, 1900, 1901, respectively. In consideration of the promise of the foregoing payments, the party of the second part hereby agrees not to run his ice machine as described above, nor suffer it to be run, for the term of five years, at Tuscaloosa, Ala., unless the party of the second part shall make a sale of the same to be run at Tuscaloosa, Ala., in which event he releases the party of the first part from making all subsequent payments to him, and also agrees to refund on any payment made by [to] him during the year such sale is made such a part of said payment as the remainder of that year bears to the entire year. It is further agreed that, if the said party of the second part shall sell his ice plant between January 1st and June 1st of any year, he shall be entitled to his proportional payment for that year. It is further agreed that in case some unknown party should erect or operate an ice machine in the city of Tuscaloosa, Ala., or in the vicinity of said city of Tuscaloosa, that the party of the second part, known in contract as B. H. Williams, shall release all subsequent pay-

ments to the party of the first part at the time of the erection of an ice plant to compete with said first party, provided that the sum of $500 shall have been paid to the party of the second part. It is further agreed that, if said plant or opposition should disturb the party of the first part before the amount of five hundred dollars is paid to the party of the second part, that the party of the first part shall only pay to the party of the second part the difference between the total payments made and the $500.00, and, should said ice plant be erected after $500.00 had been paid to the party of the second part, no other payments will be required. And plaintiff says that although he has complied with all its provisions on his part, and has not sold his said ice machine to be operated at or in the vicinity of Tuscaloosa, the defendant has failed to comply with its provisions on its part in the particulars following, viz.: Some time during the summer of 1898, to-wit, in July or August, the Tuscaloosa Gas, Electric Light & Power Co., a corporation having its office and principal place of business at Tuscaloosa, Ala., amended its corporate charter, changing its name to the 'Tuscaloosa Light & Ice Company,' and having conferred upon it the power to manufacture and sell ice at Tuscaloosa, Ala., and erected an ice plant and began the manufacture of ice at Tuscaloosa; and although the defendant had, at the time of the establishment of said Tuscaloosa Light & Ice Co.'s ice plant at Tuscaloosa, only paid to plaintiff the first payment of $175.00 mentioned in said contract as paid on the day of its execution, it has wholly failed and refused to pay plaintiff the difference between said payment of $175.00 and $500.00, as it agreed in said contract to do in the event of the erection of an opposition ice plant; hence this suit."

To this complaint the defendant interposed the following plea: "At the time said contract was entered into the plaintiff owned and operated the only ice factory in Tuscaloosa or its vicinity, and the only factory which was then selling ice to the people of Tuscaloosa and immediately surrounding territory, other than defendant's factory. Said population, consisting of, to-wit, seven thousand people, was drawing its whole supply from, and was dependent upon, said two ice factories for the same, and the demand for ice in said community was sufficient to consume and render marketable the output of both said factories. Prior to said contract the price of this article of necessity and comfort was lessened to said community of consumers by competition between these two said ice factories. The object and effect of said contract was to wholly discontinue the manufacture of ice by plaintiff, to close down plaintiff's factory, to end all competition with defendant's ice trade, to leave defendant's plant the sole source of ice supply for said community, and to give to defendant the complete control and monopoly of said ice market, enabling it to increase the price thereof regardless of the cost of its manufacture; wherefore said contract was one cornering said ice market, stifling competition, creating monopoly, closing down heretofore active manufacture, and hence the same is void as in restraint of trade and against public policy." The trial court sustained a demurrer to the plea, defendant declined to plead over, and judgment was entered for plaintiff. The present appeal from that judgment presents the question of whether the contract sued on, considered in connection with the facts averred in the plea, involves a vicious restraint of trade, and is therefore violative of the public policy of the State and void.

The argument in support of the contract is largely based upon the considerations that the restraint it imposes is limited both as to time and to territory,—to five years at the most, and to the town of Tuscaloosa and its vicinity,—and many cases have been determined upon these considerations alone. But they were so determined, or at least at the present day they could be so determined, only because the contracts involved in them were unobjectionable upon other grounds. As the principles obtaining here are understood in their application to existing conditions of traffic and commerce, we apprehend that circumstances in respect of a particular business might exist under which a covenant against engaging in it covering all time and the whole country would be upheld by the courts. All such covenants are for the protection of the business of the covenantee, and the logical rule would seem to be that their scope may be as broad as to time and territory as the business intended to be protected. It is upon this principle that contracts not to engage at any time in particular businesses in the United Kingdom, or in the United States, or even in Great Britain and Holland, or in the United States and Canada, have been held valid; the business in each instance being co-extensive with the territory embraced in the covenant, and of probable indefinite continuance. And, on the other hand, the same principle is potent to the conclusion that such covenant, having reference to a particular county or even town only, and confined to a year or other definit time, may be void, in whole or in part, for being broader as to time or place than the business designed to be protected by it; as where the business extends only to a part of the county or town, or must cease short of the time of the covenant. But however extended or circumscribed the business may be, however broad or narrow may be the covenant in respect of time and place, and however exactly the covenant may respond in time and place to the exigencies of the business, the contract may yet fall under the ban of public policy, and call for condemnation by the courts upon other and distinct considerations, growing out, it would seem, of the nature of the transaction upon which it is based, or looking to the protection of the public from the strangulation of legitimate and necessary competition.

One of these considerations—that resting on

the nature of the transaction in which the covenant not to engage in a particular business is made —is this: Leaving to one side and out of view those cases in which property is sold, and as part of the consideration the vendee agrees not to employ it in a business being carried on by the vendor, or within the territory covered by the vendor's business, and that other class of cases in which an employee covenants with his employer not to engage in the business, about which he is employed on his own account or for another after the termination of his employment, and that yet other class of cases involving secret or patented processes, or patented devices and instrumentalities, it seems that the only cases, apart, as we have indicated, from those just mentioned, in which there can be any legitimate occasion for a covenant on the part of one not to engage in the business proposed to be carried on by another, are those in which the covenantor has sold to the covenantee his stock in trade, as in the case of a merchant, or his part of it, as where one mercantile partner sells out to the other or to a stranger, or being a professional man with an established practice, as a physician, dentist, and the like, or mechanic with a shop and accustomed patronage, as a blacksmith and the like, or, if he be a manufacturer, sells out his practice or business or plant, with or without an express stipulation as to its good will, and in the same transaction, and as part of the thing sold, and as in part the consideration for the price paid, agrees not to engage in that business, profession, or trade, as the case may be, within the territory covered or supplied by the business, practice, or factory purchased, during the time the vendee shall be interested therein. In line with this view, it is said by Mr. Beach: "The modern doctrine is well-nigh universal that, when one engaged in any business or occupation sells out his stock in trade and good will or his professional practice, he may contract with the purchaser and bind himself not to engage in the same vocation in the same locality for a time named, and he may be enjoined from violating this contract. This is about as far as contracts in restraint of trade have been upheld by the American courts or those of England. While the law, to a certain extent, tolerates contracts in restraint of trade or business when made between vendor and purchaser, and will uphold them, it does not treat them with any special indulgence. They are intended to secure the purchaser of the good will of a trade or business a guaranty against the competition of the former proprietor. When this object is accomplished, it will not be presumed that more was intended." 2 Beach, Cont. § 1575. And to the same effect is the declaration of the Supreme Court of Illinois in Moore v. Bennett, 140 Ill. 69, 80, 29 N. E. Rep. 891, 15 L. R. A. 364: "Contracts in partial restraint of trade which the law sustains are those which are entered into by a vendor of a business and its good will with his vendee, by which the vendor agrees not to engage in the same business within a limited territory, and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased," and this language is quoted approvingly by the Supreme Court of Pennsylvania. Nester v. Brewing Co., 161 Pa. St. 473, 481, 29 Atl. Rep. 104, 24 L. R. A. 250. The Supreme Court of Iowa adopts the same view (Chapin v. Brown [Iowa], 48 N. W. Rep. 1074, 12 L. R. A. 428); and so have other courts, where this phase of the general question has been discussed. Oliver v. Gilmore (C. C.), 52 Fed. Rep. 562. There are several reasons for upholding the covenant on the part of the vendor in all such cases to desist from the business in competition with the purchaser which do not obtain in other cases. In the first place, the restraint is partial in the sense that it covers only the time and locality during and in which the vendee carries on the business purchased, and beyond these limitations the seller is at liberty to carry on the same business. Then, too, the vendor receives an equivalent for his partial abstention from that business in the increased price paid him for it on account of his covenant; and his entering in to and observance of the covenant not only does not tend to his pauperization to the detriment of the public, but, to the contrary, by securing to him the full value of his business and its good will,—a value which he has an absolute right to secure in this way,—the covenant operates to his affirmative pecuniary benefit and against his impoverishment, involving, the theory is, imminency of his becoming a public charge or a criminal, in that, while being paid for desisting from the particular business in the locality covered by it, he may still enter upon other pursuits of gain in the same locality or upon this one in other localities. And, finally, while such covenants preclude the competition of the covenantor, it is neither their purpose nor effect to stifle competition generally in the locality, nor to prevent it at all in a way or to an extent injurious to the public; for the business in the hands of the purchaser is carried on just as it was in the hands of the vendor; the former merely takes the place of the latter; the commodities of the trade are as open to the public as they were before; the same competition exists as existed before; there is the same employment furnished to others after as before; the profits of the business go, as they did before, to swell the sum of public wealth; the public has the same opportunities of purchasing, if it be a trading business; they are served in the same way, if it be a profession; and production is not lessened, if it be a manufacturing plant. As said by Putnam, circuit judge, in Oliver v. Gilmore (C. C.), 52 Fed. Rep. 568: "* * * When the covenanto surrenders his trade or profession, an equivalent is given to the public, because, ordinarily, as a part of the transaction, the covenantee assumes and carries on the trade or profession, nothing is abandoned, and only a transfer

is accomplished. The same occupation continues. The same number of mouths are fed." And these considerations obtain where one already engaged in a business in good faith, for the purpose of enlarging and increasing his business, purchases the stock in trade or practice or plant of a rival, and incident thereto takes the covenant of the seller not to engage in the same business within the terrritory covered by the consolidated enterprise, and in all such cases the covenant in restraint of trade is a reasonable one and valid. But there is no room for the application of these reasons to cases in which the covenantee does not purchase the business, practice, trade or plant of the covenantor, and the transaction involves nothing but a bald covenant in restraint of trade, for which there is no other consideration than the payment of money for the obligation itself. In such case the business of the covenantor is not transferred, merely; it is destroyed. His plant is not continued by the covenantee in useful production, but is left to rust and canker in disuse. The public loses a wealth-producing instrumentality. Labor is thrown out of employment. "The same number of mouths" are not fed. The consideration the covenantor receives is not the just reward for his skill and energy and enterprise in building up a business, but is a mere bribery and seduction of his industry, and a pensioning of idle ness. The motives actuating such a transaction are always, in a sense, sinister and baleful. Its purpose and effect are not to protect the covenantee in the legitimate use of something he has acquired from the covenantor, but to secure to him the illegitimate use, or the use in an illegitimate way, of that which he already has, in respect of which there is no reason or occasion for the covenantor to assume any obligation of protection. Such an undertaking in restraint of trade, however limited as to time and place, would seem, upon all general principles, though we know of no case expressly and directly so deciding, to be necessarily unreasonable and vicious on the consideration alone that it is not entered into, nor has it the effect of protecting some business, practice, trade or interest which the covenantor has sold to the covenantee. The undertaking involved in this case is precisely of that class, and must fail upon the principle we have been discussing.

But this contract is clearly bad upon the other consideration adverted to above: It tends to injure the public by stifling competition and creating a monopoly. Its manifest purpose, even upon its face, and certainly when taken in connection with the facts averred in the plea, was to secure to the covenantee a monopoly in the production and sale of ice in the town of Tuscaloosa and vicinity, and such is its operation and effect. Indeed, on the allegations of the plea, it was even worse than this; for one of its results was to reduce the available supply of ice below the needs of the locality affected by it. It thus operated not only to put it in the power of the covenantee to arbitrarily fix prices, but directly and necessarily to create a partial ice famine, upon which the defendant company could batten and fatten at its own sweet will. But, aside from this, the monopoly itself—the putting in the power of the covenantee to control the production, and to fix its own prices, whatever the production—is quite sufficient for the utter condemnation of the contract as being against public policy. The purpose to create a monopoly is obvious. It is well-nigh expressed in the writing itself. That a monopoly was created is clear beyond all dispute. That ends the case against the validity of the covenant. Nothing more need be said. All that has been said for the appellee against that conclusion is vain and useless. Given the purpose and effect of this contract, its condemnation would follow even had the plaintiff, as a part of the transaction, sold his ice plant to the defendant; and the limitation of the covenant as to time and place, though reasonable in itself, is of no redeeming importance or efficacy whatever. So of the suggestion that no monopoly was created because the contract itself evidences a contemplation that "unknown parties" might come to Tuscaloosa, establish an ice factory, and enter upon the production and sale of ice in competition with the covenantee. There was no other such plant there at the time the contract was entered into (it would not have been entered into at all had there been), and it is of no sort of consequence that another might be established, or even that another was in fact established, soon after its execution—as soon, probably, as one could be established after defendant's monopoly began to grind. Nor is there the least merit in the suggestion that ice could be brought to Tuscaloosa from other places, and hence that defendant had no monopoly. Even with ordinary commodities, a covenant tending to create a monopoly in a given city, or to unduly control prices, is not relieved by the consideration that its baneful effects may be counteracted in greater or a less degree by importations; and the position is exceedingly nude and bald when taken in respect of a commodity like ice or water, the chief cost of which, apart from the plant for its manufacture or collection, is in the transportation to the consumer, and it may be safely said that an ice factory in a town beyond the ordinary reach of delivery wagons from another town has a monopoly of the ice business in that town. And so of the argument that public policy has to do in this connection only with the necessaries of life, and that ice is not a commodity of that class. Both the propositions thus asserted—the one of law, the other of fact—are unsound. To say the least, it is against public policy to monopolize in this way any commodity of common utility, or of common consumption or use among the people, or even of considerable utility or consumption, whether it be one of the necessaries of life or not; and, in the second place, we feel entirely asured of conservatism in declaring that, in this latitude,

and especially in towns as populous as Tuscaloosa, ice is one of the common necessaries of life. All of the foregoing propositions, sustaining the conclusion that the contract sued on is violative of public policy as stifling competition and promoting monopoly to the manifest injury of the public, are fully supported by the following authorities: 2 Beach, Cont. §§ 1579-1592; Clark, Cont. p. 458 *et seq.*; Craft v. McConoughy, 79 Ill. 346; Arnot v. Coal Co., 68 N. Y. 558; More v. Bennett, 140 Ill. 69, 29 N. E. Rep. 888, 15 L. R. A. 361; Lumber Co. v. Hayes, 76 Cal. 387, 18 Pac. Rep. 391; Hooker v. Vandewater, 4 Denio, 349; Stanton v. Allen, 5 Denio, 434; Salt Co. v. Guthrie, 35 Ohio St. 666; Association v. Kock, 14 La. Ann. 168; Oil Co. v. Adoue, 83 Tex. 650, 19 S. W. Rep. 274, 15 L. R. A. 598; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Chapin v. Brown (Iowa), 48 N. W. Rep. 1074, 12 L. R. A. 428; Oliver v. Gilmore (C. C.), 52 Fed. Rep. 562; Nester v. Brewing Co., 161 Pa. St. 473, 29 Atl. Rep. 102, 24 L. R. A. 247; Anderson v. Jett, 89 Ky. 376, 12 S. W. Rep. 670, 6 L. R. A. 390. It follows that, in our opinion, the court below erred in sustaining the demurrer to the defendant's plea: The judgment of the law and equity court will be reversed, and a judgment will be here entered overruling said demurrer. The cause will be remanded. Reversed, rendered in part, and remanded.

NOTE.—*Agreements in Restraint of Trade and in Restraint of Competition Which are Void Upon Grounds of Public Policy.*—The question as to what contracts shall be considered to be in unlawful restraint of trade is one often disputed in the appellate tribunals of the present day. The unprecedented business activity of the closing years of the century, in which invention, electricity and consolidation of capital has enabled one man to do the work of a hundred, and forced the other ninety-nine into new avenues of opportunity and enterprise thrown open by the same agencies, has worked marvelous changes, not only in the methods and customs of doing business, but also in the application of the law to the changed conditions. The earlier rule of law applicable to contracts in restraint of trade was extremely harsh, all such contracts being considered as absolutely void on the ground of public policy. Later, as the right of contract became more appreciated, and trade and commerce more extended, an exception was made in favor of contracts in partial restraint of trade if reasonable and necessary to protect the covenantee. In this condition the rule existed until very recently, and still exists in some jurisdictions. Alger v. Thacher, 19 Pick. 51; Ross Sadgbeer, 21 Wend. 166; Holmes v. Martin, 10 Ga. 503; Taylor v. Blanchard, 13 Allen, 370; Hard v. Seeley, 47 Barb. 428; Nobles v. Bates, 7 Cow. 307; Pyke v. Thomas, 4 Bibb (Ky.), 486; Keeler v. Taylor, 53 Pa. St. 467; Watkins v. Morley, 2 Willson (Civ. App.), 723; Lufkin Rule Co. v. Fringeli, 57 Ohio St. 596; McCurry v. Gibson, 108 Ala. 451. The modern rule is not so harsh and has been laid down as a concession to trade and commerce. Changed conditions have necessitated a more liberal construction of the old doctrine of restraint of trade, consistent with a wise public policy. Under the modern rule the distinction between contracts in general and partial restraint of trade no longer exists. All restraints are valid if reasonably necessary to protect the covenantee, under the terms of the contract. See Nordenfelt v. Ammunition Co., L. R. (1894), A. C. 535; United States Chemical Co. v. Provident Co., 64 Fed. Rep. 946; Oakdale Mfg. Co. v. Garst, 18 R. I. 484; Tode v. Gross, 127 N. Y. 48; Machine Co. v. Morse, 103 Mass. 73; Gibbs v. Gas Co., 130 U. S. 396; Underwood v. Barker (1899), 1 Ch. 300. Probably the most exhaustive and most carefully considered decision on this subject is the celebrated English case of Nordenfelt v. Ammunition Co., *supra*, which reversed all prior rulingsof the English courts, and laid down the rule just stated. In this case Nordenfelt, a patentee and manufacturer of guns and ammunition for purposes of war, covenanted with a company to which his patents and business had been transferred, that he would not for 25 years engage anywhere in the world, either directly or indirectly, in the manufacture of guns or ammunition. Held, that the covenant, though unrestricted as to place, was not, having regard to the nature of the business and the limited number of the customers (viz., the governments of this and other countries), wider than was necessary for the protection of the company nor injurious to the public interests of the country; that it was therefore valid and might be enforced by injunction. The opinion of Lord MacNaughten in deciding the appeal contains the clearest exposition and statement of the rule to be found anywhere among the authorities. He said in part: "In the age of Queen Elizabeth all restraints of trade, whatever they were, general or partial, were thought to be contrary to public policy and therefore void. In time, however, it was found that a rule so rigid and far-reaching, must seriously interfere with transactions of every day occurrence. So the rule was relaxed gradually, and not without difficulty, until it came to be recognized that all partial restraints might be good though it was thought that general restraints, that is, restraints of general application extending throughout the kingdom, must be bad. • • • The true view at the present time, I think, is this: The public have an interest in every person carrying on his trade freely; so has the individual. All interference with individual liberty of action in trade, and all restraints of trade, of themselves if there is nothing more, are contrary to public policy and therefore void. That is the general rule. But there are exceptions: Restraints of trade and interference with individual liberty of action may be justified by the special circumstances and the particular case. It is a sufficient justification and indeed it is the only justification if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public." On page 573 Lord MacNaughten holds "that it lay on the defendant to prove the area of restriction unreasonable." This is also contrary to the rule of the earlier cases both in England and in this country. See Ross v. Sadgbeer, *supra*. The doctrine announced in this case as the rule in England has been generally followed by the federal and nearly all of the State courts of this country, some of the latter courts, as in New York and Massachusetts, carrying the rule to its farthest limit. United States Chemical Co. v. Provident Co., 64 Fed. Rep. 946; Leslie v. Lorillard, 110 N.

Y. 549; Gloucester Glue Co. v. Cement Co., 154 Mass. 92; Meyer v. Estes, 164 Mass. 457. In the following cases contracts relating to the sale of a business and its good will to another, with an agreement on the part of the vendor not to engage in the same business, sometimes unlimited as to territory, and limited as to time, or *vice versa*, have been held reasonable: Brown v. Railroad Co , 75 Hun, 355; Hulse v. Machine Co., 65 Fed. Rep. 864; Anthony v. Hitchcock, 71 Fed. Rep. 659; Meyer v. Estes, 164 Mass. 457; Tode v. Gross, 127 N. Y. 480; Banknote Co. v. Printing Co., 83 Hun, 593; Carter v. Alling, 43 Fed. Rep. 208; Billings v. Ames, 32 Mo. 265; Hoagland v. Segur, 38 N. J. Law, 230; Baumgarten v. Broadway, 77 N. Car. 8; Oakdale Mfg. Co. v. Garst, 18 R. I. 484; National Co. v. Hospital Co., 45 Minn. 272; Cowan v. Fairbrother, 118 N. Car. 406; Goodman v. Henderson, 58 Ga. 567; Eisel v. Hayes, 141 Ind. 41; Davie v. Brown, 98 Ky. 475; George v. Coal Co., 83 Tenn. 455. In the following cases the restrictions in the contract were held unreasonable: State v. Telephone Co., 36 Ohio St. 296; Berlin Works v. Perry, 71 Wis. 495; West Virginia Co. v. Pipe Line Co., 22 W. Va. 600; Western Assn. v. Starkey, 84 Mich. 76; Oregon Nav. Co. v. Winsor, 87 U. S. 64; Consumers Oil Co. v. Nunnemacher, 142 Ind. 560; Gamewell Tel. Co. v. Crane, 160 Mass. 50; Albright v. Teas, 37 N. J. Law, 171.

We now come to the most perplexing difficulty involved in the proper solution of this whole question, *i. e.*, the distinction to be observed between mere contracts in restraint of trade and contracts which suppress competition and create a monopoly. It is true that in some cases agreements in restraint of trade and in restraint of competition may be so very similar as to be difficult of identification. But courts should be careful to base their decision on proper grounds in order to dispel all unnecessary confusion from a subject of such great importance. Freedom of contract on the one side and freedom of trade and competition on the other, and the relative importance of the one over the other, is the first consideration to be consulted in the settlement of all questions of this character, and one that is often lost sight of. There is no right of the citizen the enjoyment of which is more vital to the business interests of the community than the right of contract, and a proper public policy, it seems, would seek to preserve this right from all unreasonable and unnecessary restrictions, rather than to confine it within bounds so narrow and unyielding as to discourage enterprise and impede the healthy development of business and commerce along lines of its natural evolution. Freedom of contract, therefore, is of paramount importance upon which only two restrictions are necessary, first, that that it shall put no unreasonable restraint upon trade, and, second, that it shall work no material injury to the public. The doctrine of restraint of trade has just been discussed. The principles of this doctrine are well established and free from doubt. The sole test in deciding whether a contract is in unlawful restraint of trade is whether the restraint is reasonably necessary to protect the business of the covenantee acquired under the contract. If it is, the contract can, under no circumstances, be considered in restraint of trade, and that question is absolutely determined. Under the second restriction, however, we have the doctrine of restraint of competition, a separate and distinct question, to be decided on grounds of public policy. Now a serious question arises: Is every contract that tends to restrain competition and create a monopoly *ipso facto* void; or are there any conditions under which such a contract could be held valid? In other words, can the same principles now applied to the doctrine of restraint of trade be held also to apply to the doctrine of restraint of competition? Can a contract in restraint of competition ever be considered reasonable? In view of the history of contracts in restraint of trade which at first were held void as against public policy, and then void only if the restraint were general, but valid if partial and reasonable, and finally, whether general or partial, void only if unreasonable under the circumstances and terms of the contract, we apprehend that the true rule to be applied in the construction of contracts alleged to be in restraint of competition, a rule supported both by sound logic and a recognition of the changed conditions of modern business methods, that contracts in restraint of competition or which tend to create a monopoly are not *ipso facto* void as against public policy, but that such will be the presumption subject to be rebutted by showing that such restraint is reasonable and necessary to protect the contracting parties from any disastrous consequences resulting from an unrestrained competition in that particular line of business, or that the restraint is the natural result of the enterprise of one existing firm in buying up the business and plants of its competitors without any intent between the parties to create a monopoly or that the creation of a monopoly in that line of business would not injure the public. Leslie v. Lorillard, 110 N. Y. 519; Central R. Co. v. Cushman, 143 Mass. 353; Chappell v. Brockway, 21 Wend. 157; Rafferty v. Gas Co., 37 N. Y. App. Div. 618; Anchor Co. v. Hawkes, 171 Mass. 101; Oakdale Mfg. Co. v. Garst, 18 R. I. 484; Gloucester Glue Co. v. Cement Co., 154 Mass. 92; Skrainka v. Scharringhausen, 8 Mo. App. 522; Carter-Crume Co. v. Peurrung, 86 Fed. Rep. 439; Trenton Potteries Co. v. Olyphant (N. J.), 43 Atl. Rep. 723; Manchester R. Co. v. Railroad Co., 66 N. H. 100; Nordenfelt v. Ammunition Co., *supra*; Cowan v. Fairbrother, *supra*. In Trenton Potteries Co. v. Olyphant, *supra*, the court said: "While contracts to restrain competition may be repugnant to the public interest such a restraint may result from contracts which the courts are bound to enforce. A person engaged in any trade having the right to acquire property and to do with it what he chooses may lawfully buy the business of any of his competitors. His first purchase would at once diminish competition. If his capital was large enough to enable him to buy the business of all competitors the last purchase would completely exclude competition. In the absence of legislative restrictions upon the acquisition of such property courts could impose no limitation. They would be obliged to enforce such contracts notwithstanding the effect was to diminish or even exclude competition."

It must be clearly borne in mind that it is not the restraint of competition that is against public policy, but the tendency or intent of a contract to create a monopoly that will work injury to the public. If the purposes or natural result of an agreement is to create a monopoly and thus control prices to the detriment of the public, it is void as against public policy. Richardson v. Buhl, 77 Mich. 632; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; Harding v. Glucose Co., 182 Ill. 551; State v. Distilling Co., 29 Neb. 700; Lufkin Rule Co. v. Fringeli, *supra*; Addyston Pipe Co. v. United States, 175 U. S. 211; Bagging Assn. v. Kock, 14 La. Ann. 164; Pacific Factor Co. v. Adler, 90 Cal. 110. In the last case cited the court gives an ex-

ceedingly clear idea of the distinction to be made between contracts in restraint of competition which are void as against public policy, and those which are not: "While it is clear that public policy favors the utmost freedom of contract, yet agreements in restraint of competition that threaten the public good, entered into with the object of controlling the supply and thereby enhancing the price of articles of actual necessity, become a great menace to the best interests of the commonwealth, and therefore opposed to sound public policy. The agreements were not entered into for the purpose of creating capital nor for greater facilities in the conducting of their business, nor for the protection of those by reasonable restraint upon active competitors, but for the purpose of controlling and withholding the supply of bags, and thereby taking an unjust advantage of the farmer's necessity and disposing of the fruits of its unlawful labors at an unreasonable advance in price." All of these cases just cited involved combinations among tradesmen or manufacturers either in the form of a trust or by mutual agreement to maintain prices. *A fortiori*, contracts by which one for a consideration agrees to stop his business for a certain time in order to give his competitor a monopoly, and in which no transfer of the property of the covenantor to the covenantee is implied, is absolutely void, not only because it creates a monopoly, but also because it falls within the doctrine of restraint of trade, the restriction being unreasonable and not necessary to protect the covenantee in the acquisition of any lawful rights obtained under the contract. American Co. v. Peoria Co., 65 Ill. App. 502; Fox Steel Co. v. Schoen, 77 Fed. Rep. 29. The construction put upon the various anti trust laws of the several States and of the United States is not to be confused with the rules of common law just stated. See the following cases: Greer v. Payne, 4 Kan. App. 153; State v. Insurance Co. (Mo.), 52 S. W. Rep. 595; United States v. Freight Assn., 166 U. S. 290.

HUMORS OF THE LAW.

A good story is told by one of the justices of the United States Supreme Court. He was trying to get into his gown and Mr. Justice ——— was assisting him. His hand in some manner got caught in the robe and the gown stuck. "Hang it!" he exclaimed. "The devil's in the thing." "Oh, no," said Justice ——— "You haven't half got into it."

Judge (to prisoner who has been captured in a raid on a gambling house): "What is your occupation?"

Prisoner: "I am a locksmith, your honor."

Judge: "How did you happen to be found in a gambling house, and what were you doing when the police appeared?"

Prisoner: "I was making a bolt for the door."

A man who had never seen the inside of a courtroom until he was introduced as a witness in a case pending in one of the Scotch Courts, on being sworn, took a position with his back to the jury and began telling his story to the Judge.

The Judge, in a bland and courteous manner, said: "Address yourself to the jury, sir."

The man made a short pause, but notwithstanding what had been said to him, continued his narrative.

The Judge was then more explicit, and said to him: "Speak to the jury, sir; the men sitting behind you on the benches."

The witness at once turned around, and making an awkward bow, said with perfect gravity:

"Good morning, gentlemen."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ACTION BY INFANT.—Where an infant becomes possessed of a promissory note before maturity, such infant may prosecute an action for the recovery of the amount due thereon at any time prior to the expiration of one year from the date of the removal of the disability of infancy.—TINSLEY v. PITTS, Kan., 62 Pac. Rep. 536.

2. ADMINISTRATION — Claims — Services.—Where a niece of deceased became a member of his family during her infancy, she cannot recover against his estate for her services, without proving an express promise on his part to pay her therefor.—IN RE DAILEY'S ESTATE, Wis., 83 N. W. Rep. 1111.

3. ADMINISTRATION — Executors — Powers.—Executors, unless expressly authorized by the will, have no power to bind the estate of their testator by a warranty deed, and no action can be maintained against them in their representative capacity for the breach of a contract to execute such a deed.—BAUERLE v. LONG, Ill., 58 N. E. Rep. 458.

4. ADVERSE POSSESSION—Title.—Under Hurd's Rev. St. 1897, p. 1048, ch. 83, § 6, providing that any person who has been in actual possession of real property under claim and color of title for seven years, and who has paid all taxes on such property during such time, shall acquire good title thereto to the extent of his paper title, a person who has remained in continuous possession of real estate under a deed thereto, and has paid the taxes thereon for seven years, acquires good title to the property.—KEPPEL v. DREIER, Ill., 58 N. E. Rep. 886.

5. ARBITRATION—Award.—An award of arbitrators must be final and certain, and so determine the matters submitted that an action between the same parties in regard to it will not afterwards lie, or the award is void. Every reasonable intendment, however, will be made in favor of its finality and validity.—HOIT v. BERGER-CRITTENDEN CO., Minn., 84 N. W. Rep. 48.

6. ATTORNEY AND CLIENT—Compensation.—Under a contract of employment stipulating that, if no attorney's fees were agreed on in advance of the rendition of the services, they were to be fixed by the client, the latter was entitled to fix the compensation in good

faith, and the attorney could recover no more.—TENNANT v. FAWCETT, Tex., 58 S. W. Rep. 824.

7. BANKRUPTCY—Exemptions—State Statute.—Under Sand. & H. Dig. §§ 4727-4729, providing that a debtor cannot claim an exemption in personal property in his possession as against a claim for its purchase price, and giving the seller the right to an attachment for the property in an action to recover the price, a debtor cannot avail himself of the bankruptcy law to defeat the execution of such an attachment after its issuance, by filing a voluntary petition on which he is adjudged a bankrupt, and in which he claims the property as exempt, as Bankr. Act 1898, having adopted the State laws as to exemptions, cannot be so administered as to enlarge the rights of debtors thereunder. In such case, while the property may be temporarily in the possession of the trustee, he has no title or beneficial interest therein, and the possession, in effect, remains in the bankrupt, within the meaning of the State statute, and the trustee will be directed to surrender it to the bankrupt, to be taken on the same process.—IN RE DURHAM, U. S. D. C., E. D. (Ark.), 104 Fed. Rep. 231.

8. BANKRUPTCY—Preferences.—Bankr. Act 1898, § 57*g*, providing that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences," extends to all claims of a creditor who has received a preference, and is not limited to the particular claim on account of which the preference was given or received. —IN RE TESLOW, U. S. D. C., D. (Minn.), 104 Fed. Rep. 229.

9. BANKRUPTCY — Preferences — Payments on Account.—The fact that partial payments made by a bankrupt to a creditor on account, within four months prior to the filing of petition, in the usual course of business, and received by the creditor without knowledge of the debtor's insolvency, were made for the purpose of obtaining more goods on credit, and that the creditor extended such credit, does not take the case out of the established rule that such payments constituted preferences, which, under Bankr. Act 1898, § 57g, must be surrendered before the creditor's claim can be allowed against the bankrupt's estate.—*In re* ARNDT, U. S. D. C., E. D. (Wis.), 104 Fed. Rep. 234.

10. BANKRUPTCY ACT.—In an action by a trustee in bankruptcy to set aside a preferential payment and a fraudulent transfer of his property by the bankrupt, to which he was not made a party, Held: (1) That two causes of action are not improperly united; (2) that the bankrupt was not a necessary party to the action; (3) that the bankruptcy act of 1898 is constitutional, and that the State court had jurisdiction of the action. —FRENCH v. R. P. SMITH & SONS CO., Minn., 84 N. W. Rep. 44.

11. BANKS—Powers of Cashier.—The cashier of a bank has no authority, by virtue of his office, to bind the bank by a certification of his own individual check drawn thereon; and, as in this case he had neither real nor apparent authority, the certification was invalid. —GALE v. CHASE NAT. BANK, U. S. C. C. of App., Second Circuit, 104 Fed. Rep. 214.

12. BENEFICIAL ASSOCIATIONS—Amendment of Constitutions.—Where there was no law of defendant lodge restricting the right of a member to designate a beneficiary in his benefit certificate at the time the certificate in suit was taken out, a subsequent amendment to defendant's constitution limiting persons who could be beneficiaries to certain relatives of the member, which would exclude plaintiff, would not be construed so as to affect a member's certificate which had been previously issued, in the absence of express words requiring such construction.—GRAND LODGE, A. O. U. W. v. STUMPF, Tex., 58 S. W. Rep. 840.

13. BENEVOLENT SOCIETY—Insurance.—Where a certificate in a brotherhood order names certain injuries as constituting total disabilities and provides that other claim for total disabilities shall be referred to certain officers of the order, who shall decide whether the disability is such as to totally incapacitate a member, entitling him to the full amount of his certificate, the decision of such officers as to whether an injury sustained by a member totally disabled him is a condition precedent to his recovery in an action on the certificate.—EIGHMY v. BROTHERHOOD OF RAILWAY TRAINMEN, Iowa, 83 N. W. Rep. 1051.

14. BENEVOLENT SOCIETY—Membership—Restriction. —B and others organized a sick benefit society, and adopted a constitution which provided that members should not belong to any other sick benefit society. B signed an application reciting that he had read the constitution, and was willing to submit to it. At the time B joined the society he was a member of a mutual benefit association, and so continued till his death, but the officers of the society had no knowledge of such fact until after his death, when they offered to refund the dues paid by him. Held, that the constitution restricted the membership to those who did not belong to any other sick benefit society, and, since B must be deemed to have known of this provision, he was bound by it, and his contract of membership was void.—BRETZLAFF v. EVANGELICAL LUTHERAN ST. JOHN SICK BEN. SOC., Mich., 83 N. W. Rep. 1000.

15. BILLS AND NOTES — Consideration. — Where the answer alleged that there was no consideration for the assigned note sued on, a reply alleging that the note was executed in consideration of another note, and for the purpose of enabling the payee to obtain money by the sale of the note sued on, was sufficient. —CONGLETON v. GARRARD, Ky., 58 S. W. Rep. 791.

16. BILLS AND NOTES—Consideration for Release.— Where two of the three joint purchasers of an engine and gristmill turned over the engine and mill to the other purchaser, and he agreed to pay the balance due on the notes for the price, the seller ratifying the agreement, and promising to release the other obligors from further liability, the detriment to them by the surrender of the partnership property was a sufficient consideration for the promise to release them.— AKERS v. PHILLIPS, Ky., 58 S. W. Rep. 790.

17. BILLS AND NOTES—Contemporaneous Agreement. —Where the parties to a note agree at the time of making it that it shall be paid from the proceeds of a certain mill, and that, if there are no proceeds, the note shall be returned and destroyed, parol evidence of such agreement, and that there were no proceeds, is admissible in an action by an indorsee after maturity against the maker.—ROBERTS v. GREIG, Colo., 62 Pac. Rep. 574.

18. BILLS AND NOTES—Counterclaim.—In an action upon a promissory note, to which a counterclaim was pleaded, to the effect that the note was given in pursuance of a parol agreement for the sale of certificates of bank stock by plaintiff to defendant, upon the condition that defendant might, at his option, resell them to plaintiff in consideration of the surrender of the note. Held, that parol testimony of such contract was admissible, and did not tend to change the terms of the note.—GERMANIA BANK OF MINNEAPOLIS v. OSBORNE, Minn., 83 N. W. Rep. 1084.

19. BILLS AND NOTES—Transfer—Payment.— Defendant in an action on a note alleged want of consideration, the including therein of usurious interest, payments to the payee before the transfer, and that the payee was not the *bona fide* owner thereof. There was evidence of payments, and of usurious interest being included in the note, and that the payee acted as agent of his daughter, the plaintiff, in purchasing this and other notes. Held, that defendant was entitled to a charge as to the effect of the agent's knowledge upon the rights of the principal if the jury found said agency existed, and a refusal to so charge was error. —RANFT v. BOLLES, Kan., 62 Pac. Rep. 587.

20. BROKERS—Principal and Agent.—Where a land owner instructs an agent, who is employed by the year at a specific salary, to look after certain lands, but

who has no general authority to sell the lands, to sell a portion thereof, the agent cannot make a contract with a broker for the sale thereof which will bind the principal to pay the broker for his services in effecting a sale.—WILLIAMS v. MOORE, Tex., 58 S. W. Rep. 953.

21. BUILDING AND LOAN ASSOCIATIONS—Usury.—In an action by a borrowing member to recover usury paid, plaintiff is entitled to credit on his loan by all payments made, including dues, fines, and interest, and is not chargeable with anything on account of expenses and losses, unless the answer of defendant shows affirmatively the total amount of expenses and losses, and the proportion that each share should bear.—SATURDAY NIGHT SAV. & LOAN ASSN. OF LEXINGTON v. MOORE, Ky., 58 S. W. Rep. 803.

22. CARRIERS —Injury to Employee — Negligence.—Where the conductor of a train, knowing an employee of the railroad to be aboard, permitted him to ride without demanding a pass or fare from him, in violation of the railroad's rules, such employee, riding openly, was not a trespasser, so as to exonerate the railroad from liability for injuries to him resulting from its negligence.—CHATTANOOGA RAPID TRANSIT CO. v. VENABLE, Tenn., 58 S. W. Rep. 861.

23. CHATTEL MORTGAGE — Validity—Resulting Trust. —Defendant executed an instrument selling and conveying to S, in trust, all the goods, chattels, and effects in two lumber yards, for the purpose of securing certain specific debts, and providing that defendant should not remove any of the property without the consent of the trustee, but authorizing defendant to sell it in the usual course of business, and providing that, in case of default in the payments specified, the trustee should take possession of the property. Held, that the instrument constituted a valid chattel mortgage, and was not void as to creditors on the ground that it was a resulting trust or a common-law assignment.—BELDING HALL MFG. CO. v. SLAYTON, Mich., 83 N. W. Rep. 1001.

24. CONSTITUTIONAL LAW — Nuisance — Fish — Res Judicata.—Code, 1897, § 2548, declaring a dam without a fishway a nuisance, is not violative of Const. art. 1, § 18, prohibiting the taking of private property for public use without just compensation.—STATE v. REMLEY, Iowa, 84 N. W. Rep. 3.

25. CONTRACTS—Agreement to Redeliver Note.—Where a note, under an agreement with the payee, is to be redelivered to the maker on demand on a certain contingency, the payee's failure on demand to redeliver it on the happening of the contingency is a breach of his contract, and entitles the maker to an action for damages in the amount of the note, though he has not been compelled to pay it to a third party, to whom it has been transferred.—LYLE v. MCCORMICK HARV. MACH. CO., Wis., 84 N. W. Rep. 18.

26. CONTRACT—Building Contract—Damages.—Where a contractor for the erection of a building, having dissolved his contract with the landowner, breaks his contract with a subcontractor, by ordering him to do nothing more, the latter's damages, which are the difference between what he was to receive under the contract and the cost of the work, are not to be diminished because he thereafter makes a contract to do the work for the landowner, on which he makes a profit.—OLDS v. MAPES-REEVES CONST. CO., Mass., 58 N. E. Rep. 478.

27. CONTRACT—Combinations in Restraint of Trade.—Where an owner, on the sale of a business and good will to certain firms, agrees not to re-enter such business within a specified time in a certain place, and it is charged that such firms, being the only dealers in such business in such place, combined to buy such business and good will to prevent competition, and to control prices, such agreement, though valid at common law, is void, as within the anti-trust law (Rev. St. 1895, art. 5313), making contracts void where a combination of capital or skill of two or more persons is formed to create or carry out restrictions in trade or to prevent competition in the sale or purchase of commodities.—COMER v. BURTON-LINGO CO., Tex., 58 S. W. Rep. 969.

28. CONTRACT—Restraint of Trade.—One manufacturer agreed with another engaged in the same business, in consideration of $1,500, to cease manufacturing certain articles for one year; the latter having the privilege of renewing the contract for four years more. The agreement was held void as against public policy.—CLARK v. NEEDHAM, Mich., 83 N. W. Rep. 1027.

29. CONVERSION — Ownership of Property.—In an action for conversion of grain, a finding that plaintiffs were the owners on a certain date, and between that date and a subsequent date, and while such grain was so the property of plaintiffs, it was converted, sufficiently shows that when the grain was converted plaintiffs were its owners. In an action for conversion of grain, its delivery by defendant to an agent is not available as a defense, where he was notified of the termination of such agency, and forbidden to deliver it to him.—NEWLOVE v. POND, Cal., 62 Pac. Rep. 561.

30. CORPORATIONS—Directors — Director's Meeting—By-Laws.—Where the by-laws of a corporation, adopted by virtue of Civ. Code, § 303, authorizing a corporation by its by-laws to provide for the time, place, and manner of calling and conducting its meetings, provided that the president or two directors might call special meetings of directors, and that notice should be given of each called meeting to each director one day before the meeting, and a special meeting was held, no notice having been given either of two directors, who were absent from the meeting, and the minutes of the meeting were not approved at any subsequent meeting of the board of directors, a mortgage on the corporation's property executed by the directors at such meeting was invalid.—CURTIN v. SALMON RIVER HYDRAULIC GOLD MIN. & DITCH CO., Cal., 62 Pac. Rep. 552.

31 CORPORATIONS—Payment of Debt to Bank—Ultra Vires Contract.—A contract by the terms of which a national bank receives corporate stock of another corporation in payment of a debt owing to the bank such other corporation is not *ultra vires* as to the bank when, at the time of making the contract, such corporation is financially embarrassed, and unable to meet its commercial obligations as they mature. Such contracts is directly incidental to the proper exercise of the powers for which the bank was chartered.—TOURTELOT v. WHITHED, N. Dak., 84 N. W. Rep. 8.

32. CORPORATIONS—Requisites of De Facto Corporation.—There cannot be a corporation *de facto* where such corporation could not exist *de jure*.—DAVIS v. STEVENS, U. S. D. C., D. (S. Dak.), 104 Fed. Rep. 235.

33. COUNTY COMMISSIONERS—Action Against.—An action can be maintained against a board of county commissioners upon a domestic judgment against such board.—LOCKARD v. BOARD OF COM'RS. OF DECATUR COUNTY, Kan., 62 Pac. Rep. 357.

34. CRIMINAL LAW—Embezzlement.—Where defendant was indicted for embezzlement under Rev. St. p. 363 (Cr. Code, § 80), making it an offense for a town officer to convert to his own use property of the town, it was error to instruct that the statute of limitations began to run when defendant should have paid or turned over moneys to his successor, since the statute began to run against any embezzlement or conversion when it was committed, not when it was made manifest.—WEIMER v. PEOPLE, Ill., 58 N. E. Rep. 378.

35. CRIMINAL LAW—False Pretenses.—An indictment for obtaining a signature to a deed by false pretenses is bad, it not showing that the false pretenses had any connection with the signing and delivery of the deed.—SIMMONS v. PEOPLE, Ill., 58 N. E. Rep. 383.

36. CRIMINAL PRACTICE — Burglary — Indictment.—Where no information or indictment is filed against a defendant charged with the commission of a crime

during the time at which he is held to answer, his detention is unlawful, and he is entitled to be discharged.—LEISENBERG v. STATE, Neb., 84 N. W. Rep. 6.

37. DAMAGES—Detention of Personal Property—Highest Market Value.—Compensation is the basic rule for the measure of damages. In an action for special damages for the loss of a sale of personal property at the highest market value during its detention, it is competent for the defendant to prove that within 30 days after the property was returned to the plaintiff, while he still held it, and before the action was commenced, its market value was as high, and its sale as feasible, as during the detention.—HOYT v. FULLER, U. S. C. C. of App., Eighth Circuit, 104 Fed. Rep. 192.

38. DEEDS—Conditions Subsequent.—A deed to the trustees of an academy, reciting that it was executed in consideration of the trustees having fixed on the land of the grantor "as a proper place for erecting the building of said academy, and as a permanent site for the same," did not impose a condition that the property should be perpetually used for school purposes.—FUQUAY'S HEIRS v. TRUSTEES OF HOPKINS ACADEMY, Ky., 58 S. W. Rep. 814.

39. DEEDS—Delivery.—O executed deeds conveying her real estate to her children, and, after retaining possession thereof for several months, she delivered them to D, an aged sister-in-law, who lived with her, with instructions to take care thereof, and after the death of O to deliver them to the person who should settle her estate. Afterwards O obtained the deeds, and placed them in a certain press, and informed D where she had placed them, and instructed her that, in case O got sick, to get the papers, and give them to the person who should settle her estate. Afterwards, when O got sick, she was informed by D, in response to an inquiry, that the latter had the papers, and she had replied, "All right." D did not know what the envelopes contained, though she knew who was to settle the estate, and after the death of O the deeds were delivered to the persons named as grantees. Held, that the deeds were void for the want of delivery.—OSBORNE v. ESLINGER, Ind., 58 N. E. Rep. 439.

40. DEEDS — Execution — Duress — Setting Aside.—Where a husband exchanges lands for which he has no title for other lands, and a title to the lands so acquired is taken in the name of his wife, who pays no consideration therefor, and on discovering the lack of title the opposite party tenders a reconveyance, and procures a conveyance of the lands from the wife, she cannot have such conveyance set aside for duress, since she was not injured thereby.—ROSTEIN v. PARK, Oreg., 62 Pac. Rep. 529.

41. ELECTIONS—Nominating Candidates—County Conventions.—A county convention of a political party, called by the county central committee to select delegates to a State convention, and for no other purpose, cannot depose the chairman of such committee, and supersede him by a chairman of its own selection, where the custom of such party was to select such chairman at a convention called to nominate county officers. Hence a convention for nominating candidates for office, called by such central committee through its duly-elected chairman, though he had been deposed at such convention, was the authorized convention of such party.—STATE v. HATCH, Mont., 62 Pac. Rep. 591.

42. ELECTIONS—Political Parties.—As the courts have no power to interfere with the judgment of the highest tribunal of a political party in a matter involving party government, the decision of the State central committee of the Republican party that certain persons constituted the Republican executive committee of a particular county, and that a certain one of their number is the chairman of the committee, is final and conclusive.—DAVIS v. HAMBRICK, Ky., 58 S. W. Rep. 779.

43. EMINENT DOMAIN—Condemnation.—A petition for condemnation of certain land referred to a certain corner as "the northeasterly corner," and the owner, after receiving compensation, brought a bill to enjoin taking the land, on the ground that it was not that condemned, and introduced evidence showing that the corner described was "the most northerly corner." Held, that, though the description of the corner was not scientifically correct, the description as a whole showed that the petitioner's land was meant, as it could fit no other land, and hence the injunction will not lie to restrain the enforcement of the judgment of condemnation.—HUTT v. CITY OF CHICAGO, Ill., 58 N. E. Rep. 412.

44. ESTOPPEL — Interest in Land. — Complainant's father and mother purchased a life estate in land, and the grantor agreed that, if complainant and his brother should pay a certain sum, the land should go to them on the death of their parents. Complainant executed a deed to his father and mother for his interest, which was delivered to his brother, but never recorded. This deed was executed in the presence of defendant, to whom complainant stated that he had deeded away his interest. Defendant afterwards purchased the land from complainant's father and mother on their representation that complainant had never paid anything on the land, and had conveyed his interest to them. Held, that complainant was estopped from asserting an interest in the land.—TUCKER v. PULLMAN, Tenn., 58 S. W. Rep. 873.

45. EVIDENCE — Conversion.— A farmer engaged in raising and marketing wheat is presumed to know the value thereof, and may testify thereto without showing familiarity with the market.—LINDE v. GAFFKE, Minn., 84 N. W. Rep. 41.

46. EVIDENCE—Parol Evidence—Meaning of Words and Abbreviations.—Where goods taken on a writ of replevin are described in the writ by words and abbreviations having a well-understood meaning among those who deal in such goods, but are not in such common use as to make them subjects of judicial notice, parol testimony is admissible to explain such meaning.—DAGES v. BRAKE, Mich., 83 N. W. Rep. 1039.

47. EXECUTION—Bailment. — After mortgaged property has been surrendered to the mortgagee to sell in satisfaction of the debt, it cannot be taken from his possession under execution against the mortgagor; he being a bailee with a beneficial interest.—NEWMAN v. MANTLE, Ky., 58 S. W. Rep. 788.

48. FRAUDS, STATUTE OF—Sales—Barter and Exchange. —The statute of frauds, requiring some part of goods purchased to be delivered or some part of the purchase money to be paid to render a sale valid, where no memorandum in writing is made, is applicable to a case of barter and exchange; each party in such case being both a buyer and a seller.—RAYMOND v. COLTON, U. S. C. C. of App., Second District, 104 Fed. Rep. 219.

49. FRAUDULENT CONVEYANCES—Bill of Sale.—Where a judgment debtor executed to plaintiff, a judgment creditor, a bill of sale, which was absolute on its face, for his stock of goods and book accounts, and it was agreed that the creditor should take charge of the business, with power to collect the bills receivable, but that, if the debtor should pay the debt, his property should be turned back to him, and the property was in fact left in his possession, and no invoice was taken of the stock or bills receivable, such sale was in fraud of creditors.—J. S. BROWN & BRO. MERCANTILE CO. v. ISRAEL, Colo., 62 Pac. Rep. 578.

50. FRAUDULENT CONVEYANCE—Bona Fide Creditor—Lien.—A creditor who is aware that his debtor has conveyed his property to a third party for the purpose of defrauding his creditors, but who has no intent to aid him in his fraud, may, with his consent, procure from the fraudulent vendee payment of his just claim from the property fraudulently conveyed, or a lien

upon that property to secure his just claim, which will be unassailable by the other creditors of his debtor.—JOHNSON v. TRUST COMPANY OF AMERICA, U. S. C. C. of App., Eighth Circuit, 104 Fed. Rep. 174.

51. FRAUDULENT CONVEYANCES—Husband and Wife.—Where, in an action to set aside a conveyance by decedent to his wife as in fraud of creditors, the balance of decedent's account with plaintiff at the time of the execution of the conveyance was in his favor, and the only debt owing to plaintiff at the time of decedent's death was contracted subsequent to the conveyance, evidence relating to such subsequent transactions was inadmissible and immaterial.—GONZALES v. ADOUE, Tex., 58 S. W. Rep. 951.

52. GAMING—Marginal Stock Contracts.—Const. art. 4, § 26, providing that all contracts for the sale of shares of stock in corporations or associations on margins, to be delivered at a future day, shall be void, and that the money paid on such contracts may be recovered, is not unconstitutional, as in conflict with Const. U. S. Amend. art. 14, § 1, in abridging the privileges and immunities of citizens of the United States, and depriving persons of liberty and property without due process of law, in that it denies to persons making margin contracts the equal protection of the laws, since it was within the police power of the State to prohibit such contracts, as detrimental to the general welfare.—PARKER v. OTIS, Cal., 62 Pac. Rep. 571.

53. GARNISHMENT AGAINST A COUNTY.—In the absence of statutory authority, a county cannot be subject to garnishment proceedings. — CITY OF SHERMAN v. SHOBE, Tex., 58 S. W. Rep. 949.

54. GIFTS—Promissory Note.—Where a father gives a note to his son as the share of the latter in the father's estate, and after the death of the father the son negotiates it to a person who knows the facts, the latter cannot enforce the note against the estate of the father, the note being but a promise to make a gift in the future, and being without consideration.—CONRAD v. MANNING, Mich., 83 N. W. Rep. 1038.

55. HIGHWAYS—Obstructions—Bill in Equity.—Where an obstruction of a public road compelled abutting owners to travel much further in reaching certain necessary points than previously, they might maintain a bill in equity to enjoin the obstruction.—HILL v. HOFFMAN, Tenn., 58 S. W. Rep. 929.

56. HOMESTEAD—Abandonment.—The north half of a lot was occupied as a residence by the owner and his family, and was separated from the south half by a fence, the south half being used for stalls for the owner's horses and as a camp yard for his customers. He and his wife intending to erect a business house on the south half of the lot, had a cellar dug thereon, and mortgaged it, with other property, to secure money to construct the building. The mortgage did not cover the north half of the lot, and both testified that their intention was to confine the residence homestead to that portion. Held, that the execution of the mortgage constituted an abandonment of the south half of the lot as a part of the residence homestead.—O'BRIEN v. WOELTZ, Tex., 58 S. W. Rep. 943.

57. HUSBAND AND WIFE—Alienating Husband's Affections—Evidence. — Under Comp. Laws, § 10,213, prohibiting a husband or wife from testifying to a communication made during the existence of the marriage relation after the termination thereof, a divorced wife cannot testify in an action against the father of her husband for alienating the husband's affections, as to the contents of a lost letter written by the husband to wife during the continuance of the marriage relation.—DERHAM v. DERHAM, Mich., 83 N. W. Rep. 1005.

58. HUSBAND AND WIFE — Deed — Recitals. — Where property is conveyed by a husband to his wife, an intention to make it the separate property of the wife may be shown by recitals of consideration in the deed, which, if moving from her, would give such a character to the property.—KAHN v. KAHN, Tex., 58 S. W. Rep. 925.

59. INJUNCTION—Supreme Court—Jurisdiction.—This court, in the exercise of its original jurisdiction, can issue a writ of injunction only upon an information therefor filed by the attorney-general, or under his authority, and by leave of court first obtained, and in the name of the State.—ANDERSON v. GORDON, N. Dak., 83 N. W. Rep. 998.

60. JOINT TORT FEASORS.—Where several persons are sued as jointly liable for a tort, the failure to hold one more of them will not militate against the liability of these who are guilty.—WYSS v. GRUNERT, Wis., 83 N. W. Rep. 1095.

61. JUDICIAL NOTICE.—The court will take judicial notice of the manner in which ordinary railroad business is conducted, and that a "clearance" or "clearance card," as the term is commonly used by railroad men, is a letter given an employee on quitting the service of the company, showing a voluntary quittance or the cause of his discharge, his length of service, capacity, etc., and that it isnot necessarily a letter of recommendation, such as would tend to secure him further employment.—MCDONALD v. ILLINOIS CENT. R. CO., Ill., 58 N. E. Rep. 463.

62. LOST INSTRUMENTS—Action to Recover—Indemnity.—A court of law, especially one which is vested with jurisdiction both at law and in equity—has power to require a plaintiff to give a bond of indemnity as a condition precedent to a recovery in a action brought therein on a lost negotiable instrument.—FIRST NAT. BANK OF DENVER v. WILDER, U. S. C. C. of App., Eighth Circuit, 104 Fed. Rep. 187.

63. MALICIOUS PROSECUTION—Instructions—Probable Cause.—When the question of probable cause is in issue in an action for malicious prosecution, it should be submitted to the jury to find specially on the facts, or the jury should be instructed hypothetically within the range of the facts which the evidence tends to establish as to what would constitute probable cause.—EBB v. GERMAN-AMERICAN INS. CO. OF NEW YORK, Iowa, 83 N. W. Rep. 1053.

64. MANDAMUS—Primary Elections. — A peremptory writ of *mandamus* will not issue where it is too late to benefit the party asking for it.—PEOPLE v. JEFFERS, Ill., 58 N. W. Rep. 818.

65. MARRIAGE—Breach of Marriage Promise.—Where, in an action for breach of marriage promise, plaintiff alleged an express agreement, and defendant claimed that a letter written by her in response to his offer of marriage had been a conditional acceptance, and plaintiff testified that she accepted his offer in her letter, even if such acceptance was conditional, there being testimony that it was subsequently agreed that they should be married at a certain time, it was proper to submit to the jury the question as to whether there was an express contract.—OLMSTEAD v. HOY, Iowa, 83 N. W. Rep. 1056.

66. MASTER AND SERVANT—Authority to Employ Surgeon for Injured Servant.—The employment of a surgeon for an injured employee is not within the scope of the duties of a foreman employed by a contractor to superintend workmen engaged in constructing a building, and such employment does not render the master liable for the surgeon's bill.—GODSHAW v. J. N. STRUCK & BRO., Ky., 58 S. W. Rep. 781.

67. MASTER AND SERVANT—Contributory Negligence.—Where trainmen noticed and endeavored to repair a freight car door, which was hanging by one top corner only, and, failing to repair it, continued to use the car without reporting its condition, the railway company is responsible for their negligence, resulting in the death of a section foreman, who was struck by the door swinging outward with the motion of the train in passing him, though the condition of the car was not communicated to any employee of the company occupying the position of master or vice-principal.—CHICAGO, ETC. R. CO. v. CULLEN, Ill., 58 N. E. Rep. 455.

68. MASTER AND SERVANT—Wrongful Discharge—Contract.—Plaintiff was engaged by the defendant to man

age a branch of its business for a year under a contract, with the right to defendant to terminate such employment at any time for conduct unsatisfactory to the officers of the company, or for other cause. Plaintiff was afterwards discharged, because of no fault found with him or with his management, but because the company had abandoned another branch business, and its manager there had much more experience than plaintiff, and it was thought advantageous to place him in charge. Held, that the discharge for the purpose of employing a man with more experience was within the terms of the contract.—TEICHNER v. POPE MFG. CO., Mich., 83 N. W. Rep. 1031.

69. MINING CLAIMS — Right of Alien to Inherit.—The right of an alien to inherit a mining claim located upon government land, as against every person but the United States, is determined by the laws of the State in which the claim is located.—LOHMANN v. HELMER, U. S. C. C., D. (Oreg.), 104 Fed. Rep. 178.

70. MORTGAGES — Foreclosure — Conclusiveness of Judgment.—Where a bill for the foreclosure of a trust deed avers that a defendant claims to have some interest in, or lien on, the premises, and also sets up a certificate of sale under which defendant claims, and the latter answers by general denial, he cannot question a judgment foreclosing all his interest in the premises adverse to plaintiff, as he is estopped by his answer from claiming any interest in the premises.—KERR v. MOTT, Ill., 58 N. E. Rep. 467.

71. MUNICIPAL BONDS — Street Improvement.—Acts 20 Gen. Assem. Iowa, ch. 20, § 1, declares that cities may improve streets, etc., and assess the cost on abutting property, and provides that such assessment shall constitute a sinking fund for the payment of the improvement of the street on which the property abuts, "and should be used and appropriated for no other purpose," and, to provide for defraying the cost of such improvements in the first instance, the city may issue bonds, all of which shall express on their face the name of the street to defray the cost of which they were issued, and that the proceeds of such bonds shall be used for no other purpose than the payment of the cost of improving the particular street therein named. Held, that a city, having issued such bonds, was charged, as a trustee, with the duty of collecting and applying thereon the assessments on the property abutting on the particular street therein named.—VICKREY v. CITY OF SIOUX CITY, U. S. C. C., N. D. (Iowa), 104 Fed. Rep. 164.

72. MUNICIPAL CORPORATIONS — Boards of Health—Police Power.—Where a village charter declared that the council should have all the authority conferred on boards of health by the general laws of the State so far as applicable, and authorized the council to appoint a board of health, and, acting on the advice of the board, the council caused the level of a lake, the outlet of which was within the corporate limits of the village, to be raised so that plaintiff's land was flooded, no action would lie against the village, since the council, in raising the lake, acted as representatives of the State.—MURRAY v. VILLAGE OF GRASS LAKE, Mich., 83 N. W. Rep. 995.

73. MUNICIPAL CORPORATIONS—Change of Grade—Measure of Damages.—In an action to recover damages for injury to abutting property by cutting down the grade of a street, there can be no recovery on account of the street being out of repair, or not graded or macadamized, after the grade was changed; and it is error to admit evidence or to instruct the jury as to such elements of damage.—CITY OF HENDERSON v. WINSTEAD, Ky., 83 N. W. Rep. 777.

74. MUNICIPAL CORPORATION—Defective Sidewalk—Negligence.—Whether projecting hinges, nearly 2 inches tall, on bulkhead doors, in an otherwise smooth sidewalk, constitute defects in the sidewalk which the city, in the exercise of reasonable care, should have remedied, is a question for the jury.—LAMB v. CITY OF WORCESTER, Mass., 58 N. E. Rep. 474.

75. MUNICIPAL CORPORATIONS—Defective Sidewalk—Contributory Negligence.—One who, while traveling along a public thoroughfare in the suburbs of a city, on a dark night, with knowledge of a defect in the sidewalk, leaves the road and takes the walk, and is injured by falling into the opening which he is trying to avoid, is not, as a matter of law, guilty of contributory negligence.—TAYLOR v. CITY OF MANKATO, Minn., 83 N. W. Rep. 1084.

76. MUNICIPAL CORPORATION — Lighting Streets — Franchise.—Under a city charter conferring power upon a common council to contract to supply its inhabitants with water and light, and to grant the use of the streets, etc., for those purposes, for a period not exceeding 10 years, the common council cannot grant a franchise for the use of the streets, etc., for a longer period than 10 years for those purposes.—SULLIVAN v. BAILEY, Mich., 83 N. W. Rep. 996.

77. MUNICIPAL CORPORATIONS—Open Sewer—Maintenance.—Where a city, in accordance with an ordinance duly adopted, builds a temporary open sewer on streets running through a plat which it had never accepted, an abutting property owner has an action at law for damages for the trespass, but the maintenance of such sewer cannot be enjoined, since the granting of an injunction to abate the nuisance presupposes defendant's right to do work on the street to abate the nuisance, which it did not have.—COOPER v. CITY OF CEDAR RAPIDS, Iowa, 83 N. W. Rep. 1050.

78. NEGLIGENCE OF LANDLORD.—Plaintiff was injured by the falling of a smokestack erected partly on the ground of an adjoining proprietor and partly on ground leased by defendant to such adjoining proprietor, and insecurely erected. The stack was used by defendant in connection with his building, and he had agreed to keep it in repair. Held, that defendant, and not his tenant, was liable for the injury.—BOYCE v. SNOW, Ill., 58 N. E. Rep. 403.

79. NOVATION—Requisites.—An agreement by a new firm to pay all obligations of an old firm does not render the new firm liable for a debt due from the old firm to a creditor who was not a party to the agreement.—DARLING v. RUTHERFORD, Mich., 83 N. W. Rep. 999.

80. PATENT RIGHTS—Sale—Contract. — Where plaintiff's application for a patent had been rejected by the patent office, a contract with defendant, pending the application, purporting to sell him the exclusive right to manufacture plaintiff's invention, was void for lack of a subject-matter, and plaintiff could not recover yearly royalties under its terms.—HAMILTON v. PARK & MCKAY CO., Mich., 83 N. W. Rep. 1018.

81. PLEDGES — Property in Bond — Warehouse Receipts.—A party holding a warehouse receipt for certain tobacco in bond, as security for a number of accommodation notes, which receipt contained a statement that the tobacco had been received on storage "on account of" such party, and having across its face the words "Not negotiable," pledged the tobacco to plaintiff as security for loans, and indorsed the receipt to him. Held, that the warehouse receipt conferred on the holder no greater rights, as against the true owner, than the goods themselves, and hence, since the party had no authority from the owner to sell or pledge, plaintiff was only entitled to hold the receipts until a sum equal to the original debt for which they had been pledged had been paid.— COMMERCIAL NAT. BANK v. BEMIS, Mass., 58 N. E. Rep. 476.

82. PRINCIPAL AND SURETY—Discharge of Surety.—If the obligee in a bond obtains control of money or property of the principal therein, which he may lawfully apply to the discharge of that principal's obligation to him, and to which he is not otherwise entitled, and then voluntarily surrenders or releases the money or property, so that the surety loses the benefit of the security it furnishes, the latter is discharged from liability on the bond to the extent of the value of the money or property thus surrendered. — WOOD v. BROWN, U. S. C. C. of App., Eighth Circuit, 104 Fed. Rep. 208.

83. RAILROAD COMPANY — Receivers — Actions. — A court appointed a receiver for a railroad company, and enjoined all bondholders, creditors, and others interested in the property from bringing suits against the receiver in any other court. Held, that the injunction applied only to the suits of bondholders, creditors, and others, whose claims were in existence at the time the receiver was appointed, and not to claims for the torts of the receiver while operating the road after his appointment.—BURKE v. ELLIS, Tenn., 58 S. W. Rep. 855.

84. RAILROAD COMPANY — Street Railroads — Negligence.—The parents of a child injured by a street car cannot recover for negligence in running the car at an excessive speed, where the child ran unexpectedly in front of the car, and the accident would have happened in the same way had the car been going at a reasonable speed, as the speed was not the proximate cause of the injury.—HOLDRIDGE v. MENDENHALL, Wis., 88 N. W. Rep. 1109.

85. RECEIVER—Foreign Receiver.—In a suit by a foreign receiver as such to foreclose a mortgage, a demurrer interposed on the ground that the receiver had no capacity to sue in the courts of the State should have been overruled where the petition alleged that the mortgage had been assigned to the receiver.—HALE v. HARRIS, Iowa, 88 N. W. Rep. 1046.

86. RECEIVERS—Jurisdiction to Appoint.—The courts in any jurisdiction may, in a proper case, take possession through receivers of property within its limits, independently of the question of the domicile of the owner; but, where the purpose of a suit is to wind up a corporation, or a joint-stock association, or a partnership, on account of alleged insolvency or fraudulent transactions, or where a general receivership of the property of such concern is sought, the initial proceedings should be at the place of domicile, and other receiverships should be ancillary thereto.—HUTCHINSON v. AMERICAN PALACE CAR CO., U. S. C. C., D. (Me.), 104 Fed. Rep. 182.

87. RELEASE AND DISCHARGE—Compromise.—Where two or more persons are liable for an injury sustained by a third party, the damages recoverable are not apportionable in law between the parties so liable, and a settlement with the injured party by one inures to the benefit of all who are responsible for such injury.—HARTIGAN v. DICKSON, Minn., 88 N. W. Rep. 1091.

88. REMOVAL OF CAUSES—Time of Application—State Statute.—On consideration of a motion to remand a cause to the State court because the petition for removal was not filed in time, the federal court cannot take judicial notice of a rule of the State court by which the time in which pleadings may be filed is extended beyond the date fixed by the general statute of the State.—YARNELL v. FELTON, U. S. D. C., E. D. (Tenn.), 104 Fed. Rep. 161.

89. SALE—Contract — Breach.—Where a contract of sale of a musical automaton provided that the sellers should have fifteen days, after notice that the instrument was not as represented, in which to elect whether they would send a man to make it so, or order the instrument returned to them for examination or repair, or replace it with a new instrument, on their failure to proceed to repair the instrument, as required by the contract, within a reasonable time, the buyer had the right to refuse to accept it.—PRICE v. MARTHEN, Mich., 88 N. W. Rep. 1021.

90. TAX DEED — Failure to Record.—Where the holder of a tax deed fails for six months from its date to have it recorded as required by law, said tax deed becomes void, and the grantee therein cannot retain a lien on the land described, for taxes paid, by afterwards taking possession thereof.—HUMPHREY v. YOST, Kan., 62 Pac. Rep. 550.

91. TAX DEED—Validity.—A tax deed for several separate tracts of land, bid off by the county treasurer for the county at a tax sale, to be valid upon its face must show that the sale of each tract failed for want of a bidder who would pay the amount due thereon.—HOWARD v. HULBERT, Kan., 62 Pac. Rep. 545.

92. TRADE-MARK — Unfair Competition—Fraud and Deceit.—The basis of a suit for unfair competition in trade is fraud. To warrant relief in such a suit, there must be proof of the fraudulent intent to palm off the goods manufactured by others as though manufactured by the plaintiff, or proof of facts and circumstances from which such an intent and fraud may be fairly inferred.—GORHAM MFG. CO. v. EMERY-BIRD-THAYER DRY GOODS CO., U. S. C. C. of App., Eighth Circuit, 104 Fed. Rep. 243.

93. TRUST DEED—Impairment of Security—Action for Damages.—Where the grantor in a trust deed given to secure a debt conveys his equity to defendants, who unlawfully cut down and remove the standing timber from the land described, the beneficiary in the deed may maintain an action for the injury, though not in possession or entitled to possession, since it is an impairment of his security.—ARNOLD v. BROAD, Colo., 62 Pac. Rep. 577.

94. TRUST DEED — Trust Fund — Investment — Identification.—A trustee invested the trust fund in a drug store and fixtures, taking title in his own name, and so conducted the business at the same place until his death, four years later, but always during such time acknowledged the trust. After his death, his administratrix conducted the business for two years, when it was sold. Held, that since the drug store as an entity, and not the individual items of stock, constituted the trust fund, it was only necessary to identify it, at the time of the sale by the administratrix, as the same as that in which the trust fund was originally invested, in order to follow it, and impress a trust thereon.—BYRNE v. MCGRATH, Cal., 62 Pac. Rep. 559.

95. TRUSTS — Vested Estate.—Where a trust deed declared that after the death of the *cestui que trust*, leaving a wife and child or children, the trustee should receive the profits, and apply the same to the use of the wife and children during the wife's life, and that at her death the estate should pass absolutely to such children, one of the children, on the death of the *cestui que trust*, took a vested interest in the estate, of which she could dispose by will.—CONOVER v. HEWITT, Mich., 88 N. W. Rep. 1009.

96. WILLS—Bequest to Widow.—In the first clause of testator's will he bequeathed to his half-brother a specific piece of land. By the second clause he bequeathed another specific piece to his sister. By the third clause he gave and bequeathed unto his wife "all the statute of the State of Michigan allows a widow." By the fourth clause he bequeathed the remainder of his estate, both real and personal, to his brother and two sisters, "after my wife receives what the statute of the State of Michigan allows a widow." Held, that as the testator died without issue, his widow is entitled to one-half of his real estate, which the statute gives her.—MURDOCH v. BILDERBACK, Mich., 88 N. W. Rep. 1007.

97. WILLS—Devise to a Class.—Testator's will provided: "I give and bequeath to the legal and direct descendants—the heirs of their bodies begotten and their heirs—of my brother W, and his wife, M (now both deceased), the one-fourth part of my estate." Held, that the clause, "the heirs of their bodies begotten and their heirs," limited the clause immediately preceding, and hence the devise did not descend to the heirs generally of the ancestors named, but only to the heirs of their bodies.—LANCASTER v. LANCASTER, Ill., 58 N. E. Rep. 462.

98. WILLS—Trusts—Diversion of Trust Funds—Implied Trust.—Where a house and lot are deeded to a father in trust for his children, and insurance money for the house and the proceeds of the lot are used by him in part payment for his own land, an implied trust in favor of the beneficiaries arises, for the funds thus misapplied, which becomes a charge on the land.—KAPHAN v. TONEY, Tenn., 58 S. W. Rep. 909.

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